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ABSTRACT

This publication is intended to assist school lawyers, business officials, board members, and administrators in making sound decisions, understanding the legal implications, and securing the maximum contractual protections for the school district before a school construction project begins. The first chapter examines the necessity of investigating and evaluating potential sites for school construction to avoid unforeseen environmental liability. This is followed by chapter 2 exploring the legal ramifications of an emerging project delivery method, design-build--its advantages and disadvantages, and the legal considerations before opting for this non-traditional approach to school construction. Chapters 3, and 4 describe the agreements school districts will sign with various entities in the design and construction process. Chapter 5 deals with issues relating to architect-owner agreements and construction manager contracts review standard forms of agreement commonly proffered by these professionals and recommend changes to protect the school district's interests and concerns. Chapter 6 discusses school construction bidding issues; and finally, chapter 7 explains the provisions crucial to an effective contract between schools and general contractors. (An appendix lists other resources.) (EV)

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From the Ground Up:

Legal Issues in School Construction

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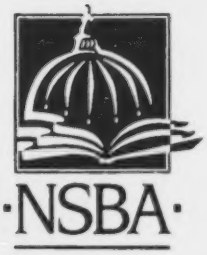

April 2002

About the NSBA Council of School Attorneys . . . .

Leadership in legal advocacy for public schools has been the overriding mission of the NSBA Council of School Attorneys throughout its celebrated history. The Council was formed in 1967 to provide information and practical assistance to attorneys who represent public school districts. It is the only national advocacy organization composed exclusively of attorneys representing public K-12 school boards. It offers continuing legal education, specialized publications, a forum for exchange of information and it supports the legal advocacy efforts of the National School Boards Association. For information on membership, contact your state school boards association or the NSBA Council of School Attorneys.

The Council accepts individual attorney members in some states and has an affiliate member agreement with the following state attorneys' councils: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, and West Virginia.

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FROM THE GROUND UP: LEGAL ISSUES IN SCHOOL CONSTRUCTION is a publication of the NSBA Council of School Attorneys. NSBA's Office of General Counsel and Office of Constituent Services provide professional and executive staff support to the Council and its varied programming for school attorneys across the United States. For more information about Council membership, publications and programs, call NSBA at 703/838-6722 or write NSBA Council of School Attorneys, 1680 Duke Street, Alexandria, Virginia 22314. *(http://www.nsba.org/cosa)*

FOREWORD

Approximately $50 billion dollars is currently spent on school construction and renovation every year. As school facilities age and the population grows, this expenditure of public funds is unlikely to diminish. *From the Ground Up: Legal Issues in School Construction* is presented by the NSBA Council of School Attorneys to assist school lawyers, business officials, board members and administrators in making sound decisions, understanding the legal implications and securing the maximum contractual protections for the school district before a school construction project even begins.

The legal issues surrounding school construction are copious and complex. This book does not attempt to address them all. For example, it does not explore the legal requirements and process for financing school construction, nor does it discuss compliance with environmental laws, building codes or accessibility standards. Similarly, it omits discussion of construction defect litigation.

Its focus is on helping schools make good choices by understanding the legal issues and their practical implications at several key decision making points prior to construction so that schools can avoid costly mistakes. The first chapter examines the necessity of investigating and evaluating potential sites for school construction to avoid unforeseen environmental liability. This is followed by a chapter exploring the legal ramifications of an emerging project delivery method, design-build—what are its advantages and disadvantages, what are the legal considerations before opting for this non-traditional approach to school construction. Several of the chapters analyze the agreements school districts will sign with various entities in the design and construction process. The chapters relating to architect-owner agreements and construction manager contracts review standard forms of agreement commonly proffered by these professionals and recommend changes to protect the school district's interests and concerns. The chapter on general contractor agreements explains in general the provisions crucial to an effective contract. This book also offers a look at an alternative for managing risk for school construction projects and explains the myriad issues related to bidding laws.

Because so much of the law related to school construction is state specific, the discussion is general, emphasizing issue identification and analysis as a means to prevent future legal difficulties. While this book strives to provide accurate legal information, nothing in it should be construed as legal advice. When questions arise concerning school construction issues, a qualified professional should be consulted.

The Council is indebted to the attorneys who contributed their time and expertise to this publication. The Council also recognizes the efforts of all the NSBA staff members who prepared these articles for publication.

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Chapter 1

INVESTIGATION AND EVALUATION: KEYS TO SELECTING SAFE SITES FOR SCHOOL CONSTRUCTION*

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"SPECIAL ATTENTION MUST BE GIVEN TO THE POTENTIAL ENVIRONMENTAL AND HEALTH HAZARDS OF A PROPOSED SCHOOL SITE."

INTRODUCTION

As school districts across the country move to meet growing population demands by expanding or renovating old schools and building new ones, special attention must be given to the potential environmental and health hazards of a proposed school site. Current environmental laws governing contaminated property cast a wide net of procedural hoops and potential liability that may impede needed school site acquisitions and development. More importantly, a school district should proceed carefully in planning, structuring and managing the inspection and eventual purchase of a school site to ensure the safety of children, faculty and staff at new or renovated schools.

This chapter provides an overview of the main environmental considerations in evaluating a potential site for school construction and/or redevelopment. A school board or district should take several common-sense steps to identify potential health or construction risks before significant funds are committed to the purchase of property and/or a construction plan. As of

* The contents of this chapter and related appendices are designed to provide general summary information about the topics addressed. They are not intended to provide and should not be interpreted as providing legal advice. The authors wish to thank Thomas Butler and Alfred Fraijo, summer associates in the San Francisco office, for their significant contributions to this article.

SCHOOL SITES RAISE ENVIRONMENTAL CONCERNS

In recent years, several school projects that have encountered significant environmental issues during or after construction have focused attention on the subject of school siting and led to heightened scrutiny of school board decisions.

- In Los Angeles, the discovery of underground oil fields and explosive gases during the construction of a multi-million dollar school complex in the Belmont area halted construction after the project was more than halfway complete.

- In Elmira, New York, extensive soil and air testing was begun after parents raised concerns that the population at Southside High School, built in 1979 on the site of numerous former manufacturing operations, had suffered an unusually high number of cancer cases. Although no causal relationship has been established and the state departments of environmental conservation and health have determined that the site is safe, the school board and other officials must now decide for themselves whether the buildings and school grounds, including athletic fields, should continue to be used.

- The school board in Corry, Pennsylvania decided to consolidate four of the five small elementary schools into one large school with a capacity for more than 1,000 students. The site chosen for the new school is next to Foamex, a polyurethane foam manufacturing plant that ranks second in Pennsylvania for hazardous air emissions. Local parents have been working to convince the school board to select an alternate site.[1]

- The Miami-Dade School Board has found itself defending selection of a site for a new high school that sits on a portion of a federally designated flood-hazard area.[2] Additional dredging and site preparation could cost the board $5.6 million before construction can even begin. Questions were raised whether adequate pre-purchase inspections had been completed.

this writing, only California has a statute that compels school administrators to investigate potentially contaminated property.[3] But, school boards need not wait for state legislators to act before instituting procedures to ensure public safety and to make sound infrastructure investments.

The scope of this chapter and space limitations prevent a discussion of the steps a school board should take if, despite best efforts or investigation, a site is found to be contaminated. Environmental statutes and common law create a complex scheme of liability and regulations governing the cleanup of contaminated properties. It is also beyond the scope of this chapter to address such complicated questions as "what levels of contamination are

1. CENTER FOR HEALTH, ENVIRONMENT AND JUSTICE, POISONED SCHOOLS: INVISIBLE THREATS, INVISIBLE ACTIONS 21 (March 2001).
2. *See Land Deal Flooded With Questions*, SCHOOL CONSTRUCTION NEWS, May/June 2001.
3. CENTER FOR HEALTH, ENVIRONMENT AND JUSTICE, CREATING SAFE LEARNING ZONES 2 (2002).

acceptable?" or "what clean-up standards should be applied?" The answers will vary depending on the contaminant of concern and applicable state and federal standards. The standards for appropriate clean-up for possible school sites may also change over time. Needless to say, the best way to avoid having to address these issues is to avoid problems in the first place. Key to this "ounce of prevention" philosophy is careful site investigation and evaluation.

PRIOR TO PROPERTY PURCHASE AND/OR CONSTRUCTION

Children's health and safety plays a prominent role in the selection of a site for a new school. Yet there are no national health-based child-sensitive standards for safe or acceptable levels of contaminants in the air or soil that can serve as a guide for school districts in need of more schools.[4] As the examples highlighted on page 2 emphasize, the siting and construction of schools near contaminated properties can lead to legal and financial difficulties. A recent report titled *Creating Safe Learning Zones* by the Center for Health, Environment and Justice showed that in just five states (California, Massachusetts, Michigan, New Jersey and New York), there are over 1,100 schools located within a half-mile radius of federally- or state-identified contaminated sites.[5]

As a school district considers the information in this chapter, it may want to develop its own protocol for evaluating potential school sites. Such a protocol should focus on the issues of particular sensitivity to the local area. For example, some school districts may be located in a heavy industrial area, while other districts may be located in an area rich in archaeological resources.

SITING AND DUE DILIGENCE

Before the acquisition of a proposed school site, an accurate and comprehensive evaluation of the site's environmental condition, including the potential extent of contamination, must be conducted. Such a site assessment supports the decision making process from a variety of angles. First, it identifies problems and potential risks associated with the selected site. In addition, the assessment process itself will result in the development of a comprehensive record of the school board's decision and presumably help justify that decision. Finally, site assessment and evaluation may be vital in constructing certain legal defenses that can be raised should litigation eventually occur. For example, under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[6] a site owner's liability is strict, joint and several as well as retroactive.[7] Ascertaining the environmental condition of a property may allow buyers and lenders to raise an innocent purchaser or landowner defense,[8] where "appropriate inquiry" into the environmental condition of the property may exempt an owner from liability related to preexisting contamination.[9]

4. CENTER FOR HEALTH, ENVIRONMENT AND JUSTICE, POISONED SCHOOLS: INVISIBLE THREATS, INVISIBLE ACTIONS 30 (March 2001).

5. The report is available at http://www.childproofing.org

6. 42 U.S.C. § 9601 *et seq.*

7. Under strict liability a school district may be held responsible for cleanup costs based solely on its ownership or operation of contaminated property, even if it played no role in causing the contamination. Joint and several liability means that the school district can be liable for 100% of the property cleanup costs, again, even if it played no role in causing it. Retroactive liability means that a party may be held liable for cleanup costs even if the acts causing the contamination were legal at the time they occurred.

8. 42 U.S.C. § 9607(b).

9. U.S. v. Serafini, 706 F. Supp. 346, 353-354 (M.D. Pa. 1988); In re Hemingway Transport, Inc., 993 F.2d 915 (1st Cir. 1993).

Environmental due diligence at the pre-purchase stage is a fundamental component that can help avoid future health concerns for any acquisition. From a risk management perspective, the proper conduct of due diligence also may affect the way liability is imposed on the parties to the transaction. In light of these considerations, some states have elected to regulate closely a school district's new school site acquisition and development. In California, the legislature has passed a measure that would require the Department of Toxic Substances Control to directly investigate a proposed school site before development and construction plans are finalized.[10] A school district's efforts to expand and develop new schools may thus be affected by changes to state environmental regulations.

Phase I and Phase II Environmental Site Assessments

Once a site is proposed, the school district should contract with an environmental consulting firm or assessor to conduct a two-phase environmental site assessment. (See Attachment A, *infra* at 12, for sample contract language.) The process for evaluating a proposed site should be conducted on a schedule consistent with the projected time schedule for developing the school site. Typically, the Phase I site assessment can be completed in 3 to 4 weeks, while a Phase II assessment, if found to be necessary, can require 8 to 16 weeks. However, every site poses unique considerations that affect the type of investigations performed and their respective duration.

- **Phase I**

A Phase I site assessment provides the potential user and developer with enough information to determine the amount of due diligence to be performed before the property can be used. It will guide a school district, as the prospective purchaser, on the type of further investigation and, if necessary, remediation if contamination is found. The American Society for Testing and Materials (ASTM) has created a practice guide establishing industry-wide standards for environmental site assessments. Phase II builds on the discoveries made during the initial phase. Indeed, the scope of Phase II analysis normally depends on the results of the Phase I study. While generally Phase I does not include physical testing or sampling, Phase II will incorporate Phase I recommendations for a more technical investigation where contamination is likely to be present.

The assessment process begins with the negotiation of access to the property, including the right to collect soil and groundwater samples as well as samples from existing structures conducted during a Phase II site assessment. Before allowing such access, the potential seller may require an indemnification agreement, whereby the seller expects to recover for any damage to the premises and interference with existing activity at the site.

The major inspection criteria in Phase I includes a thorough review of property records, interviews of the current owners and operators, a site surveillance or reconnaissance, and a final evaluation and a written report. Review of public and private records of current and past uses, including any environmental liens against the property provides critical information regarding the history of use for the site. Records inspection should include, but not be limited to, review of the property in any reasonably accessible databases of contaminated and potentially contaminated sites, federal and state agency registries, as well as historical aerial photographs. Review of archaeological databases also should not be overlooked. In Miami-Dade the school

10. CAL. EDUC. CODE § 17210 *et seq.*

board faced challenges over the purchase of a parcel that contains an ancient Native-American burial site.[11]

When inspecting the site, particular attention should be given to any physical evidence that explains prior and current use and suggests the likelihood of contamination. During the site visit, attention should also be given to surrounding properties for possible sources of contamination. Interviews with persons familiar with the site's history involves inquiry of any past clean-up efforts, changes to site use, and changes or developments of surrounding properties or facilities. The final report for Phase I should include all environmental conditions discovered, recommendations for future investigation and an initial assessment regarding a new owner's exposure to liability.

- **Phase II**

Phase II will focus on the analysis of soil and ground and surface water. Air will also be sampled if potential sources of air pollution have been identified. If applicable, Phase II will include testing of building materials, equipment and existing structures for lead or asbestos, among other contaminants. Where toxins or contaminants are found, a Phase II report will include grid samples that describe the nature and extent of the contamination to a reasonable degree. Additionally, specialized devices will be used to locate the areas where contaminants are concentrated and/or their potential sources. If buildings on a site must be demolished, sampling may need to be conducted under those structures following demolition to get a complete picture of potential problems. The final report for Phase II will involve a detailed summary of the samples taken and techniques used for their study, tables explaining laboratory results as well as the characteristics of any contaminants located at the site. Lastly, the report may include the consultant's recommendations describing any necessary additional work or information gaps affecting the report's findings.

History of the Property

Environmental due diligence also requires that special attention be given to prior uses of the site to better determine the potential contamination and health risks present. Before more resources are invested in a more in-depth site assessment, preliminary interviews with former and current owners and operators about the property's use may reveal that the property is not suitable for a school. Obtaining a title report will likely reveal important information about prior use and provide contact information regarding former owners and operators. Alternatively, an accurate evaluation of a property's history of use can provide a viable framework for determining the most effective method of quantifying risks during a Phase I and Phase II site assessment as well as any future remediation efforts.

Participation of surrounding communities may also be beneficial. A school district may elect to notify the surrounding community of the environmental evaluation performed at the proposed sight. Neighbors may have lived in a community for decades. Their involvement may lead to indispensable information regarding the history of the site as well as surrounding industrial uses that will aid in creating a more complete environmental assessment of the site. In many states, more formal involvement is required. (*See* environmental impact analysis discussion *infra*, at 7.) A school district may also consider accessing the U.S. Environmental Protection Agency's (EPA) database of hazardous substance release sites to determine whether the property itself or neighboring properties, have been the site of a chemical spill.[12]

11. *See Indian Grave on Debated School Parcel*, MIAMI HERALD, April 25, 2001.

12. EPA's database of Superfund sites can be accessed at http://www.epa.gov/superfund/sites/locate/index.htm

Nearby Industrial Uses

The type of land use activity found in surrounding properties directly impacts the suitability of a proposed site for school construction. Any factories, scrap yards, refineries, and chemical storage facilities, among other industrial use properties, surrounding the proposed sight represent potential risks and sources of contamination. Identification of property within a reasonable radius from the site is recommended to determine the potential for those surrounding land-use activity posing significant health hazards. The environmental sampling data also provide clues to the source of contamination that may be linked to industrial plants or facilities in the surrounding area. In addition, assessment of surrounding facilities will influence the type of clean up and mitigation measures that are necessary to prevent future contamination. Given these considerations, school districts should consult the EPA's Toxic Release Inventory (TRI) and their state department of environmental protection and health for current listings of sites that pose contamination concerns. (See Attachment C, *infra* at 26, for further information on TRI access.)

CONTRACTUAL PROTECTIONS

Discovering the presence of contamination at the property with a thorough environmental assessment is one mechanism for controlling future liability from existing environmental hazards at the site. However, once a school district proceeds with the acquisition of the site, an important step is to design and include special contractual provisions in the sale agreement that address environmental risks and liabilities. The timetable for entering negotiations for the purchase of the site will likely come after the Phase I environmental site assessment, assuming that report comes back clean or with minor problems that can be addressed. Once enough information concerning the environmental hazards found on the site is collected and a school board is convinced about the soundness of purchase and/or development plans, legal counsel for the district can begin to craft specific purchase agreement provisions that reflect the school district's best interests and protect it from liability.

"AN IMPORTANT STEP IS TO DESIGN AND INCLUDE SPECIAL CONTRACTUAL PROVISIONS IN THE SALE AGREEMENT THAT ADDRESS ENVIRONMENTAL RISKS AND LIABILITIES."

General Indemnity

In the environmental risks arena, general indemnity involves contractually allocating liability (shifting or transferring risks) between the current owner and purchaser from any claim or action arising out of the release of contamination that occurs prior (or subsequent) to the purchase of the property. Therefore, executing a general indemnity agreement or including general indemnification and release provisions in the final purchase agreement is a fundamental component to purchasing a targeted site. As a condition to purchasing the property, the school district may require the owner to indemnify the purchaser against any misrepresentations contained in the purchase agreement as well as any future claims arising out of preexisting contamination. Conversely, the owner will require to be indemnified from liabilities incurred as a result of the school district's development and operation at the site. A school district should expect to include notification and opportunity to defend provisions along with any indemnification agreement. Finally, while negotiating provisions in a purchase agreement that shift or transfer liability related to environmental risks found on the site, the school district, as purchaser, should note their limitations. For example, environmental indemnification serves to apportion liability among parties but it does not release a party's underlying liability

to the government under CERCLA or similar state Superfund statutes.[13]

Specific Environmental Provisions

To ensure that its interests are protected, a school district should consider including a range of environmental protections in the final acquisition agreement. The school district may elect to incorporate covenants that obligate the owner to comply with all environmental regulations in its own operations before the school district takes control of the property, thereby ensuring that no substantial changes to the environmental condition of the property occur prior to the date of possession. Similarly, provisions could be negotiated that compel the owner to pay for a cleanup before the district takes title and the standards that apply to the cleanup. Further, it may negotiate the duration of the owner's representations and warranties after a purchase agreement is finalized, since environmental liabilities usually surface some time after the initial purchase. Other important environmental provisions for the purchaser to consider include obtaining the owner's express acknowledgment regarding site conditions and any specific environmental hazards discovered during environmental site assessments. Lenders will likely require separate covenants that exempt lenders from liability arising out of the purchaser's operation and development of the site. Moreover, lenders will want to ensure that property is not seriously contaminated if it serves as collateral for a loan.

13. Kaufman & Broad-South Bay v. Unisys Corp., 822 F. Supp. 1468 (N.D. Cal. 1993); Chemical Waste Mgt. v. Armstrong World Indus. 669 F. Supp. 1285 (E.D. Pa. 1987).

Leasing

A school district may decide to enter into a lease agreement instead of purchasing the targeted parcel based purely on economic advantages. Leasing the property may also limit liability if unanticipated contamination is discovered at a site. For example, under CERCLA, the school district, as a lessee, may be exempt from liability related to contamination that existed before the lease was executed. However, it may be difficult for the school district to prove existing contamination is unrelated to its own operations at the site if similar materials that caused the contamination are being used by the lessee.[14] Pursuant to CERCLA, as under other federal or state environmental laws, a lessee may be treated the same as an owner for liability purposes.[15] As a safeguard, before the signing of a leasing agreement, the school district should perform similar environmental due diligence inquiries as those involved when purchasing the property, including a Phase I Site Assessment and on-site inspection, among other site-specific investigations that lead to a complete evaluation of the parcel.

A lease agreement for a school site should include particular protections relating to school operations, such as the increased sensitivity of children to potential contaminants, as well as the traditional contractual provisions that accompany a real estate purchase. Along with the types of indemnities discussed in this chapter, a school district should consider including specific covenants in a leasing agreement that anticipate environmental risks and possible remediation of

14. Some courts have found a lessee or tenant liable under CERCLA as an "owner" when the lessee or tenant was involved in the disposal of hazardous waste at the site. *See Clear Lake Properties v. Rockwell International*, 959 F. Supp. 763, 768 (S.D. Tex. 1997) (imposing strict liability on a tenant laboratory facility that had played no role in causing the relevant contamination); *U.S. v. National Bank of the Commonwealth*, 1990 WL 357792 (W.D. Pa. Apr. 23, 1990) (same).

15. U.S. v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); Burlington N.R.R. v. Woods Indus., 815 F. Supp. 1384 (E.D. Wash. 1993).

hazardous materials discovered or released on the property during the lease period. For example, the school district may choose to condition the lease on the accuracy of the representations made by the landlord. The landlord will likely require the lease to include that the tenant report to state and federal agencies any construction or development on the premises under applicable environmental regulations. The lease may also include a landlord's right of entry to inspect the premises and make any repairs. Finally, a school district should also be cautious of a landlord's attempts to negotiate "as is" clauses or provisions that disclaim all representations and warranties regarding the property. Although the courts are more willing to interpret "as is" clauses narrowly and may not exempt a landlord from CERCLA contributions claims,[16] it is in the school district's best interest to independently perform a thorough investigation of the premises. Finally, the school district may also choose to condition the lease on the accuracy of the representations made by the landlord.

ENVIRONMENTAL IMPACT ANALYSIS

State Statutory Programs (Mini-NEPAs)

A number of states have adopted statutes similar to the federal National Environmental Policy Act (NEPA).[17] (See Attachment B, *infra* at 17, for examples of state statutes.) NEPA requires federal agencies to consider the potential environmental effects of proposals for federal action, including issuance of permits for private projects, prior to taking final action. Similarly, the purpose of these analogous state programs is to assess the potential environmental impacts of a project as an integral part of the planning process. In some states, the siting of a school may trigger the requirements of those statutes, thereby placing the district in a process that openly considers possible environmental effects of the proposed action, with full public participation.

Many state programs, often referred to as mini-NEPAs, parallel NEPA's limitation covering only those projects that will result in "significant" effects on the environment, while others encompass a broader array of projects including any project that may result in environmental effects. Generally, the mini-NEPAs fall into two general categories—procedural and substantive. Those in the procedural category focus on the steps of identifying potential impacts and appropriate mitigation measures. Those in the substantive category go one step further. They require that the alternative that results in the least impact on the environment be selected.

States programs also differ with regard to the agencies covered. Some state programs apply only to state level agencies and will not cover local entities, while the majority of the states with mini-NEPA programs impose requirements on local agencies. Despite the differences in state programs, most share three basic requirements discussed below.

Identifying Potential Impacts

The first step in analyzing a proposed project is to identify and evaluate its potential impacts. General categories that must be examined include: air quality, aesthetic resources, land use, waste management, traffic, plants and wildlife, water quality, and historic resources. After identifying the resources that may potentially be impacted by a proposed project, the next step is to evaluate the severity or significance of the impacts. This analysis takes place through one of several types of documents. The most comprehensive analysis used in situations

16. International Clinical Lab., Inc. v. Stevens, 710 F. Supp. 466 (E.D.N.Y. 1989); Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1055 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986).

17. 42 U.S.C. § 4321 *et seq.*

ENVIRONMENTAL IMPACT ANALYSIS REQUIREMENTS

- Identify potential impacts—air quality, aesthetic resources, land use, waste management, traffic, plants and wildlife, water quality, historic resources.
- Identify project alternatives—alternate locations, no project.
- Identify mitigating measures with monitoring plan.
- Mitigate impacts and monitor success.
- Select alternative with least environmental impact.

where the impacts are potentially significant is usually referred to as an environmental impact statement (EIS) or environmental impact report (EIR). If project impact analysis results in the conclusion that no significant impacts will be caused, some less comprehensive analysis is published. Under the federal program and some state programs, this is referred to as a Finding of No Significant Impact (FONSI).[18]

Identifying Project Alternatives

A second key component of mini-NEPA analysis is the identification of project alternatives. This involves the analysis of potential impacts associated with viable project alternatives. These could include school siting alternative locations or a no project alternative. Although this analysis may be useful in identifying potential alternative school sites, it is often a perfunctory exercise reaching the predictable conclusion that the proposed project is the best alternative.

One beneficial approach for a school district may be to study more than one proposed site at a time. Concurrently studying several alternative sites ensures more viable options for a school district and may even accelerate the final selection process. If one site does not meet a school district's criteria, acquisition of remaining sites can be pursued more aggressively. Additionally, the investigation process for individual sites may be consolidated, thereby maximizing a district's resources. For example, title searches and access to a city's public records may be conducted at one time for multiple sites. If the alternative sites are neighboring parcels, investigations of surrounding properties may reveal potential hazardous conditions regarding several targeted sites. Considering several properties at a time may also provide useful comparisons between sites that may lead a school district to choose to develop a site that requires less or no remediation.

Mitigation Planning and Monitoring

The third major aspect of mini-NEPA programs is the identification of measures to minimize or avoid potential impacts associated with the school project. Each significant or potentially significant impact should have an associated mitigation measure. For example, if traffic congestion on city streets surrounding the proposed school location is identified as a potentially significant impact, a school board may propose adding a lane to a major artery or adding signals or turning lanes to relieve congestion. In addition, the mitigation measure might include incentives to facilitate alternative transportation as well as measures to integrate regular auto traffic with school bus pick-up and drop-off areas.

The mitigation plan must also include a monitoring aspect and all measures identified in the mitigation plan should be enforceable. This means that a school board may have to commit

18. Other state programs refer to it as a Negative Declaration.

to traffic counts or water management techniques and monitor the success of the proposed measures. If the board itself will be responsible for monitoring, it should take into account the added costs of measuring and mitigating potential impacts for the life of the school.

INSURANCE

In recent years, the redevelopment of contaminated or otherwise environmentally challenged properties has become more frequent. The properties, termed "brownfields," present unique risks with regard to continuing and potential future liability for the owner and developer. Not surprisingly, the insurance industry has responded to the marketplace demand for new insurance products specifically geared for remediation and reuse of these contaminated properties. The primary role of insurance is to eliminate or reduce the uncertainty that exists for all parties involved in brownfield property transactions. Municipal governments, property owners, developers, potential purchasers and financial institutions as well as school districts can benefit from these new insurance products by reducing their present and future environmental liability. Environmental insurance providers now offer flexible and responsive insurance products to assist parties in getting brownfield projects planned, cleaned, developed and completed. Insurance products applicable to brownfield projects include the following.

Remediation Stop Loss Coverage

One of the newest and perhaps most critical types of coverage offered by environmental insurers is remediation stop loss. This coverage allows the project owner to cap the remediation costs for a project. The discovery of higher-than-expected concentrations or wider spread contamination may result in additional incurred cleanup costs. In any development, a pro forma is prepared to arrange financing and determine the financial liability of a project. By being able to cap one of the most significant cost drivers in brownfield redevelopment, property owners and developers are better able to predict their break-even point for a profitable transaction. It also allows them to secure better credit terms since the project's viability is more certain.

Remediation Legal Liability

Remediation legal liability protects the insured against the cost of remediating any additional contamination that is discovered onsite. This coverage provides additional security to the insured for any pre-existing contamination that was unknown at the time the site was acquired.

Pollution Legal Liability Coverage

Pollution legal liability coverage protects the insured against suits brought for damages for bodily injury or property damages caused by the migration of contamination from the insured's site to neighboring property. Pollution legal liability coverage may also cover more indirect exposures such as suits for diminution in value of neighboring sites from contamination from an insured's activities.

Defense Coverage

In many actions brought under environmental liability coverage, the cost of defense will exceed the actual damages paid out. This coverage provides to the insured the cost of defense, as well as the cost of investigating the claim.

CONCLUSION

Just as with any real property acquisition and development, the siting of a new school raises potential environmental and health concerns. This chapter highlighted some of those concerns and outlined considerations for due diligence and environmental impact analysis. A school district undertaking a new school project faces a myriad of concerns, but careful study and planning from an environmental perspective can help avoid some major pitfalls down the road and can, in the long run, conserve valuable funds in addition to providing a safe and healthy environment for education.

ATTACHMENT A: SAMPLE CONSULTING SERVICES CONTRACT

CONSULTING SERVICES CONTRACT

This CONSULTING SERVICES CONTRACT is entered into effective _____ 20_, by and between _____ ("Counsel") as legal counsel for its client, _____ ("Client"), and _____ ("Consultant").

WHEREAS, Counsel requires the assistance of an expert consultant in connection with _____ ,as specified in the Scope of Work, attached hereto as Exhibit "A";

WHEREAS, Counsel has been authorized by Client to retain an expert to assist Counsel as specified in the Scope of Work;

WHEREAS, Consultant is in the business of providing professional consulting services in the fields of _____ ;

NOW, THEREFORE, upon the terms and conditions set forth herein, and for good and valuable consideration, receipt and sufficiency of which are hereby acknowledged by both parties, it is agreed as follows:

1. Services. Consultant shall perform for Counsel and Client the consulting services (hereinafter the "Services") described in the Scope of Work, attached hereto as Exhibit "A" and incorporated by reference herein, and as may be amended from time to time.

2. Contract Term/Performance Schedule. The term of this Contract shall commence as of _____ and shall continue until satisfactory completion of the Services, in the reasonable business discretion of Counsel and Client, or upon termination in accordance

with the provisions set forth herein. Counsel may terminate all or part of this Contract at any time without cause, upon giving Consultant notice of termination. In such event, however, Counsel agrees to arrange for payment to Consultant (in accordance with the terms set forth in Paragraph 3) for all services properly performed up to the date of Consultant's termination.

3. Compensation. For satisfactory performance of the Services, Counsel shall arrange for payment to Consultant for the Services on the basis identified in Exhibit "B" attached hereto and incorporated by reference herein. Consultant shall provide to Counsel a monthly detailed statement of the Services provided and expenses incurred pursuant to the Scope of Work. Within a reasonable time after receipt of such detailed statement, Counsel will send an invoice to Client for payment that covers payment of Consultant's statement. Within ten (10) business days after receipt of payment from Client for the Services rendered by Consultant, Counsel will make payment to Consultant. Consultant specifically acknowledges and agrees that the Services are being performed for the benefit of Client, that Client has the sole responsibility for payment, and that Counsel has no responsibility for payment to Consultant unless and until Client makes payment to Counsel for the Services.

4. Representations and Warranties. Consultant represents and warrants that it shall perform the Services in accordance with all applicable legal requirements and professional standards, and with that standard of care, skill, and diligence normally provided by a professional person or firm in the performance of similar services. At its sole expense, Consultant shall promptly correct any portion of the Services which fails to meet the above requirements, provided Consultant is notified by Counsel in writing of such defective Services within thirty (30) days after completion of any such portion of Consultant's Services. Consultant is hereby given notice and acknowledges that Counsel will be relying on the accuracy, expertise, competence, and completeness of Services and upon Consultant's lawful performance hereunder.

5. Subcontracts. Consultant shall not subcontract for any part of the Services or obligations hereunder without the prior written consent of Counsel.

6. Reports to Counsel. Consultant shall report to and consult with Counsel with respect to all matters covered by this Contract, and Consultant shall make itself available at reasonable times and places to report to and consult with Counsel in connection with the Services. Reports, invoices, and correspondence shall be sent to Counsel at the following address: _____ , Attn: _____ .

7. Confidentiality. Consultant acknowledges that its retention by Counsel, [the proposed transaction under consideration by Client] and all data, samples, materials, drawings, photographs, recordings, documents, results, communications, and any other information acquired from Counsel or Client or developed by or on behalf of Consultant (the "Service Information") in the course of performing Services hereunder is information being provided or developed to enable Client to obtain legal advice from Counsel and is confidential and covered by the attorney-client privilege. Consultant shall treat Service Information as confidential and Consultant shall ensure that it and those performing on its behalf maintain strict security over all Service Information and shall not, without Counsel's or Client's prior written consent, divulge any Service Information, directly or indirectly, to any person, corporation, or other entity, including governmental agencies or representatives, other than to the authorized representatives of Counsel and Client. Consultant shall be responsible for any breach of this confi-

dentiality provision by its agents, representatives, employees, or subcontractors. In addition to and without limiting the foregoing, Consultant agrees that:

A. All documents, including letters and reports, generated by Consultant shall be prominently marked as "PRIVILEGED AND CONFIDENTIAL," and Consultant shall keep all writings and other materials received or generated under this Contract in separate files marked "PRIVILEGED AND CONFIDENTIAL."

B. All written reports shall be submitted to Counsel in draft form before submission in final form on instructions of Counsel. All draft reports shall, in addition to being marked as "PRIVILEGED AND CONFIDENTIAL," shall also be prominently marked as "DRAFT - FOR DISCUSSION PURPOSES ONLY."

C. Consultant agrees that it will not, during the term of this Agreement and for a period of ten (10) years subsequent to the expiration or termination hereof, disclose to any third party any information which Consultant acquired from or about Client (or any of its affiliates) or its plans and operations, as a result of the confidential relationship created herein.

Consultant's obligation of confidentiality shall not apply to Service Information which at the time of disclosure is in the public domain, or after disclosure becomes, through no act or fault of Consultant or its employees, part of the public domain; was developed by Consultant or was in Consultant's possession prior to the receipt of same from Client; or is furnished to Consultant by others as a matter of right without restriction on disclosure. Consultant's obligation also shall not apply to disclosures compelled by law, an order of a court of competent jurisdiction or a subpoena, provided, Consultant shall immediately notify Counsel of the circumstances under which such disclosure is sought, and refrain from such disclosure for the maximum period of time allowed by law so that Counsel may procure a protective order or take other actions to protect the confidentiality of the information. The obligations of confidentiality set forth in this Paragraph shall survive the expiration or termination of this Contract.

8. Counsel Property. All Service Information shall be and remain the confidential and proprietary property of Counsel and shall be delivered to Counsel upon request, and in any event, a copy of all Service Information shall be turned over to Counsel at the termination of this Contract. Upon request, Consultant shall execute or secure execution of any documents, including assignments, that may be requested by Counsel for the purpose of prosecuting, enforcing or affirming its ownership rights.

9. Insurance. During the term of this Contract, Consultant shall, at its own expense, maintain adequate insurance to cover liability for the acts of its employees and/or Company. A certificate of insurance will be provided by Consultant at Counsel's request.

10. Indemnity. Consultant shall be responsible for and shall defend, indemnify and save Counsel and Client harmless from and against any and all damages, losses, claims, judgments, penalties, demands, liabilities, causes, and causes of actions, including all reasonable expenses and attorneys' fees and costs, arising out of injuries to or the death of any person or persons, or arising out of loss of or damage to any property or interests of any person or entity, to the

extent caused by, resulting or arising from, directly or indirectly, Consultant's performance hereunder, the negligent, wilful or wrongful acts or omissions of the Consultant or any one performing on its behalf (including its contractors or subcontractors), or Consultant's breach of any term, representation or warranty of this Contract, except that Consultant assumes no liability to defend, indemnify, or hold harmless Counsel or Client for acts or omissions of Counsel or Client.

11. Independent Contractor. In performing the Services, Consultant shall operate as and have the status of an independent contractor and shall not act as or be deemed an agent, employee, partner, or joint venturer of Counsel or Client. Unless prior written authorization is provided to Consultant, Consultant shall have no power or authority to enter into any agreement or obligation on behalf of Counsel or Client, it being understood that Counsel's and Client's liability is only that expressed in this Contract. Where Consultant enters into contracts it shall do so as principal. As an independent contractor, Consultant will be solely responsible for determining the means, manner, and method for performing the Services, and all payroll taxes, unemployment taxes, income taxes, disability taxes, unemployment insurance, workers' compensation insurance, and the like, for Consultant, its employees, agents, independent contractors, and subcontractors, shall be the sole and exclusive responsibility of Consultant. Consultant is not entitled to workers' compensation or other benefits from Client or Counsel, and Consultant is obligated to pay federal and state income taxes on any monies earned pursuant to the contract relationship.

12. Conflicts of Interest. Consultant warrants that it is not a party to any other existing or previous agreement that would prevent Consultant from entering into this Contract or which would adversely affect Consultant's ability to perform the Services. During the term of this Contract Consultant will not, without the prior written consent of Counsel, perform services for any other person or entity if such services are reasonably likely to lead to a conflict of interest with respect to Consultant's obligations under this contract.

13. Assignment. Consultant's rights and obligations hereunder are deemed to be personal and may not be transferred or assigned without the prior written consent of Counsel, and any attempted assignment in violation of this provision shall be void and of no effect. This Contract may be assigned by Counsel without the consent of Consultant, provided that notice of such assignment shall be given to Consultant. This Contract shall be binding upon and inure to the benefit of the parties, their successors and assigns.

14. Advertising and Publicity. Consultant shall not use the name of Counsel or Client or any related companies in any advertising or promotional releases, literature, or the like without the express written permission of the entity affected.

15. Waiver. No change in, addition to, or waiver of any of the provisions of this Contract shall be binding upon either party unless in writing signed by an authorized representative of each party. No waiver by either party of any breach by the other party of any of the provisions of this Contract shall be construed as a waiver of any subsequent breach, whether of the same or of a different provision in this Contract.

16. Severability. In the event that any of the provisions, or portions or applications thereof, of this Contract are held to be unenforceable or invalid by any court of competent

jurisdiction, Consultant and Counsel shall negotiate an equitable adjustment in the provisions of this Contract with a view toward effecting the purpose of this Contract and the validity and enforceability of the remaining provisions, or portions or applications thereof, shall not be affected thereby.

17. Injunctive Relief. Consultant acknowledges that the breach of its confidentiality obligations would cause Counsel to suffer irreparable harm, and agrees that legal damages would not be a sufficient remedy for any breach of the confidentiality obligations by Consultant, its agents, representatives or employees. Accordingly, Consultant consents to injunctive or other appropriate equitable relief, including specific performance, upon the institution of legal proceedings by Counsel.

18. Governing Law: This Contract shall be governed and construed in accordance with the internal laws of _____.

19. Termination: Notwithstanding any other provisions of this Agreement, Client and Consultant shall have the right, at their sole option, without cause, and without incurring liability for damages, to terminate this Agreement by giving each other fifteen (15) days advance written notice. In the event either party exercises said option, Consultant shall be paid the consulting fee earned and reimbursable expenses incurred as of the date of such termination of this Agreement.

20. Entire Agreement: This Agreement represents the entire agreement between the parties hereto and supersedes any oral or written understandings heretofore entered into by or on account of the parties.

IN WITNESS WHEREOF, the parties hereto have entered into the Contract effective as of the date first above written.

[NAME OF CONSULTANT]
By:
Name:
Title:

[COUNSEL FOR SCHOOL BOARD]
By:
Name:
Title:

Source: Fred R. Wagner, Beveridge & Diamond, P.C., Washington, D.C.

ATTACHMENT B: SELECTED ENVIRONMENTAL QUALITY STATUTES (NEW YORK AND WASHINGTON)

NEW YORK STATE ENVIRONMENTAL QUALITY REVIEW

Section 8-0101. Purpose.

8-0103. Legislative findings and declaration.

8-0105. Definitions.

8-0107. Agency implementation.

8-0109. Preparation of environmental impact statement.

8-0111. Coordination of reporting; limitations; lead agency.

8-0113. Rules and regulations.

8-0115. Severability.

8-0117. Phased implementation.

Sec. 8-0101. Purpose.

It is the purpose of this act to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state.

Sec. 8-0103. Legislative findings and declaration.

The legislature finds and declares that:

1. The maintenance of a quality environment for the people of this state that at all times is healthful and pleasing to the senses and intellect of man now and in the future is a matter of statewide concern.

2. Every citizen has a responsibility to contribute to the preservation and enhancement of the quality of the environment.

3. There is a need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people of the state, including their enjoyment of the natural resources of the state.

4. Enhancement of human and community resources depends on a quality physical environment.

5. The capacity of the environment is limited, and it is the intent of the legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds from being reached.

6. It is the intent of the legislature that to the fullest extent possible the policies, statutes, regulations, and ordinances of the state and its political subdivisions should be interpreted and administered in accordance with the policies set forth in this article. However, the provisions of this article do not change the jurisdiction between or among state agencies and public corporations.

7. It is the intent of the legislature that the protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy. Social, economic, and environmental factors shall be considered together in reaching decisions on proposed activities.

8. It is the intent of the legislature that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.

9. It is the intent of the legislature that all agencies which regulate activities of individuals, corporations, and public agencies which are found to affect the quality of the environment shall regulate such activities so that due consideration is given to preventing environmental damage.

Sec. 8-0105. Definitions.

Unless the context otherwise requires, the definitions in this section shall govern the construction of the following terms as used in this article:

1. "State agency" means any state department, agency, board, public benefit corporation, public authority or commission.

2. "Local agency" means any local agency, board, district, commission or governing body, including any city, county, and other political subdivision of the state.

3. "Agency" means any state or local agency.

4. "Actions" include:

(i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies;

(ii) policy, regulations, and procedure-making.

5. "Actions" do not include:

(i) enforcement proceedings or the exercise of prosecutorial discretion in determining whether or not to institute such proceedings;

(ii) official acts of a ministerial nature, involving no exercise of discretion;

(iii) maintenance or repair involving no substantial changes in existing structure or facility.

6. "Environment" means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.

7. "Environmental impact statement" means a detailed statement setting forth the matters specified in section 8-0109 of this article. It includes any comments on a draft environmental statement which are received pursuant to section 8-0109 of this article, and the agency's response to such comments, to the extent that such comments raise issues not adequately resolved in the draft environmental statement.

8. "Draft environmental impact statement" means a preliminary statement prepared pursuant to section 8-0109 of this article.

Sec. 8-0107. Agency implementation.

All agencies shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this article, and shall recommend or effect such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this article. They shall carry out its terms with minimum procedural and administrative delay, shall avoid unnecessary duplication of reporting and review requirements by providing, where feasible, for combined or consolidated proceedings, and shall expedite all proceedings hereunder in the interests of prompt review.

Sec. 8-0109. Preparation of environmental impact statement.

1. Agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.

2. All agencies (or applicant as hereinafter provided) shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment. Such a statement shall include a detailed statement setting forth the following:

(a) a description of the proposed action and its environmental setting;

(b) the environmental impact of the proposed action including short-term and long-term effects;

(c) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(d) alternatives to the proposed action;

(e) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(f) mitigation measures proposed to minimize the environmental impact;

(g) the growth-inducing aspects of the proposed action, where applicable and significant;
(h) effects of the proposed action on the use and conservation of energy resources, where applicable and significant, provided that in the case of an electric generating facility, the statement shall include a demonstration that the facility will satisfy electric generating capacity needs or other electric systems needs in a manner reasonably consistent with the most recent state energy plan;
(i) effects of proposed action on solid waste management where applicable and significant;
(j) effects of any proposed action on, and its consistency with, the comprehensive management plan of the special groundwater protection area program, as implemented by the commissioner pursuant to article fifty-five of this chapter; and
(k) such other information consistent with the purposes of this article as may be prescribed in guidelines issued by the commissioner pursuant to section 8-0113 of this chapter.

Such a statement shall also include copies or a summary of the substantive comments received by the agency pursuant to subdivision four of this section, and the agency response to such comments. The purpose of an environmental impact statement is to provide detailed information about the effect which a proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such action. Such statement should be clearly written in a concise manner capable of being read and understood by the public, should deal with the specific significant environmental impacts which can be reasonably anticipated and should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts.

3. An agency may require an applicant to submit an environmental report to assist the agency in carrying out its responsibilities, including the initial determination and, (where the applicant does not prepare the environmental impact statement), the preparation of an environmental impact statement under this article. The agency may request such other information from an applicant necessary for the review of environmental impacts. Notwithstanding any use of outside resources or work, agencies shall make their own independent judgment of the scope, contents and adequacy of an environmental impact statement.

4. As early as possible in the formulation of a proposal for an action, the responsible agency shall make an initial determination whether an environmental impact statement need be prepared for the action. When an action is to be carried out or approved by two or more agencies, such determination shall be made as early as possible after the designation of the lead agency.

With respect to actions involving the issuance to an applicant of a permit or other entitlement, the agency shall notify the applicant in writing of its initial determination specifying therein the basis for such determination. Notice of the initial determination along with appropriate supporting findings on agency actions shall be kept on file in the main office of the agency for public inspection.

If the agency determines that such statement is required, the agency or the applicant at its option shall prepare or cause to be prepared a draft environmental impact statement. If the applicant does not exercise the option to prepare such statement, the agency shall prepare it, cause it to be prepared, or terminate its review of the proposed action. Such statement shall describe the proposed action and reasonable alternatives to the action, and briefly discuss, on the basis of information then available, the remaining items required to be submitted by subdivision two of this section. The purpose of a draft environmental statement is to

relate environmental considerations to the inception of the planning process, to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision making process in determining the environmental consequences of the proposed action. The draft statement should resemble in form and content the environmental impact statement to be prepared after comments have been received and considered pursuant to subdivision two of this section; however, the length and detail of the draft environmental statement will necessarily reflect the preliminary nature of the proposal and the early stage at which it is prepared.

For any action for which the agency determines that such statement is not required and which would take place in a special groundwater protection area, as defined in section 55-0107 of this chapter, the agency shall show how such action would or would not be consistent with the comprehensive management plan of the special groundwater protection program, as implemented by the commissioner pursuant to article fifty-five of this chapter.

The draft statement shall be filed with the department or other designated agencies and shall be circulated to federal, state, regional and local agencies having an interest in the proposed action and to interested members of the public for comment, as may be prescribed by the commissioner pursuant to section 8-0113.

5. After the filing of a draft environmental impact statement the agency shall determine whether or not to conduct a public hearing on the environmental impact of the proposed action. If the agency determines to hold such a hearing, it shall commence the hearing within sixty days of the filing and unless the proposed action is withdrawn from consideration shall prepare the environmental impact statement within forty-five days after the close of the hearing, except as otherwise provided. The need for such a hearing shall be determined in accordance with procedures adopted by the agency pursuant to section 8-0113 of this article. If no hearing is held, the agency shall prepare and make available the environmental impact statement within sixty days after the filing of the draft, except as otherwise provided.

Notwithstanding the specified time periods established by this article, an agency shall vary the times so established herein for preparation, review and public hearings to coordinate the environmental review process with other procedures relating to review and approval of an action. An application for a permit or authorization for an action upon which a draft environmental impact statement is determined to be required shall not be complete until such draft statement has been filed and accepted by the agency as satisfactory with respect to scope, content and adequacy for purposes of paragraph four of this section. Commencing upon such acceptance, the environmental impact statement process shall run concurrently with other procedures relating to the review and approval of the action so long as reasonable time is provided for preparation, review and public hearings with respect to the draft environmental impact statement.

6. To the extent as may be prescribed by the commissioner pursuant to section 8-0113, the environmental impact statement prepared pursuant to subdivision two of this section together with the comments of public and federal agencies and members of the public, shall be filed with the commissioner and made available to the public prior to acting on the proposal which is the subject of the environmental impact statement.

7. a. An agency may charge a fee to an applicant in order to recover the costs incurred in preparing or causing to be prepared or reviewing a draft environmental impact statement or an environmental impact statement on the action which the applicant requests from the agency; provided, however, that an applicant may not be charged a separate fee for both the preparation and review of such statements. The technical services of the department may be

made available on a fee basis reflecting the costs thereof, to a requesting agency, which fee or fees may appropriately be charged by the agency to the applicant under rules and regulations to be issued under section 8-0113.

b. Such rules and regulations shall require the applicant to reimburse the conservation fund, as established pursuant to subdivision (a) of section eighty-three of the state finance law, in order to recover all costs incurred in preparing or causing to be prepared or reviewing a draft environmental impact statement or an environmental impact statement by employees of the department, whose salary and expenses are paid, in whole or in part, from the conservation fund.

8. When an agency decides to carry out or approve an action which has been the subject of an environmental impact statement, it shall make an explicit finding that the requirements of this section have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided.

9. An environmental impact statement shall be prepared for any action found to have a significant impact on the special groundwater protection area, as defined in section 55-0107 of this chapter. Such statement shall meet the requirements of the most detailed environmental impact statement required by this section or by any such rule or regulation promulgated pursuant to this section.

WASHINGTON STATE ENVIRONMENTAL POLICY ACT (EXCERPTS)

RCW 43.21C.010 Purposes.

The purposes of this chapter are: (1) To declare a state policy which will encourage productive and enjoyable harmony between man and his environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and stimulate the health and welfare of man; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation.

[1971 ex.s. c 109 § 1.]

RCW 43.21C.020 Legislative recognitions -- Declaration -- Responsibility.

(1) The legislature, recognizing that man depends on his biological and physical surroundings for food, shelter, and other needs, and for cultural enrichment as well; and recognizing further the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource utilization and exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state of Washington, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to: (a) foster and promote the general welfare; (b) to create and maintain conditions under which man and nature can exist in productive harmony; and (c) fulfill the social, economic, and other requirements of present and future generations of Washington citizens.

(2) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

(a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) Preserve important historic, cultural, and natural aspects of our national heritage;

(e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(3) The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

[1971 ex.s. c 109 § 2.]

RCW 43.21C.030 Guidelines for state agencies, local governments -- Statements -- Reports Advice -- Information.

The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

(a) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(b) Identify and develop methods and procedures, in consultation with the department of ecology and the ecological commission, which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations;

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:

(i) the environmental impact of the proposed action;

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) alternatives to the proposed action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any public agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, province, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the department of ecology, the ecological commission, and the public, and shall accompany the proposal through the existing agency review processes;

(e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(f) Recognize the world-wide and long-range character of environmental problems and, where consistent with state policy, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(g) Make available to the federal government, other states, provinces of Canada, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(h) Initiate and utilize ecological information in the planning and development of natural resource-oriented projects.

[1971 ex.s. c 109 § 3.]

RCW 43.21C.031 Significant impacts.

(1) An environmental impact statement (the detailed statement required by RCW 43.21 C.030(2)(c)) shall be prepared on proposals for legislation and other major actions having a probable significant, adverse environmental impact. The environmental impact statement may be combined with the recommendation or report on the proposal or issued as a separate document. The substantive decisions or recommendations shall be clearly identifiable in the combined document. Actions categorically exempt under RCW 43.21C.II0(I)(a) do not require environmental review or the preparation of an environmental impact statement under this chapter. In a county, city, or town planning under RCW 36.70A.040, a planned action, as provided for in subsection (2) of this section, does not require a threshold determination or the preparation of an enviromnental impact statement under this chapter, but is subject to environmental review and mitigation as provided in this chapter.

An environmental impact statement is required to analyze only those probable adverse environmental impacts which are significant. Beneficial environmental impacts may be discussed. The responsible official shall consult with agencies and the public to identify such impacts and limit the scope of an environmental impact statement. The subjects listed in RCW 43.21C.030(2)(c) need not be treated as separate sections of an environmental impact statement. Discussions of significant short-term and long-term environmental impacts, significant irrevocable commitments of natural resources, significant alternatives including mitigation measures, and significant environmental impacts which cannot be mitigated should be consolidated or included, as applicable, in those sections of an environmental impact statement where the responsible official decides they logically belong.

(2)(a) For purposes of this section, a planned action means one or more types of project action that:

(i) Are designated planned actions by an ordinance or resolution adopted by a county, city, or town planning under RCW 36.70A.040;

(ii) Have had the significant impacts adequately addressed in an environmental impact statement prepared in conjunction with (A) a comprehensive plan or sub-area plan adopted under chapter 36.70A RCW, or (B) a fully contained community, a master planned resort, a master planned development, or a phased project;

(iii) Are subsequent or implementing projects for the proposals listed in (a)(ii) of this subsection;

(iv) Are located within an urban growth area, as defined in RCW 36.70A.030;

(v) Are not essential public facilities, as defined in RCW 36.70A.200; and

(vi) Are consistent with a comprehensive plan adopted under chapter 36.70A RCW.

(b) A county, city, or town shall limit planned actions to certain types of development or to specific geographical areas that are less extensive than the jurisdictional boundaries of the county, city, or town and may limit a planned action to a time period identified in the environmental impact statement or the ordinance or resolution adopted under this subsection.

[1995 c 347 § 203; 1983 c 117 § 1.]

RCW 43.21C.038 Application of RCW 43.21C.030(2)(c) to school closures.

Nothing in RCW 43.21C.030(2)(c) shall be construed to require the preparation of an environmental impact statement or the making of a threshold determination for any decision or any action commenced subsequent to September 1, 1982, pertaining to a plan, program, or decision for the closure of a school or schools or for the school closure portion of any broader policy, plan or program by a school district board of directors.

[1983 c 109 § 1.1.]

ATTACHMENT C: U.S. ENVIRONMENTAL PROTECTION AGENCY TOXICS RELEASE INVENTORY

PURPOSE

What is TRI?

The Toxics Release Inventory (TRI) is a publicly available EPA database that contains information on specific toxic chemical releases and other waste management activities reported annually by certain covered industry groups as well as federal facilities. This inventory was established under the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), which requires facilities to use their best readily available data to calculate their releases and waste management estimates. If facilities do not have actual monitoring data, submitted values are derived from various estimation techniques.

Reporting Year (RY) 1999 is the most recent TRI data available. Facilities reporting to TRI were required to submit RY 1999 data to EPA by July 2000. *TRI Explorer* provides access to two sets of *frozen* data: the current data update (as of August 1, 2001); and public data release (PDR) data (as of December 28, 2000). The current data update includes revisions/withdrawals that have been submitted by facilities since the initial public data release (i.e., the annual release of the TRI data) until August 1, 2001. To view the most recent data that has been submitted after August 1, 2001, please access EPA Envirofacts. <http://www.epa.gov/enviro/html/ef_overview.html>

What is the TRI Explorer?

The TRI Explorer <http://www.epa.gov/triexplorer/reports.htm> provides access to the TRI data to help

<http://www.epa.gov/triexplorer/>

communities identify facilities and chemical release patterns that warrant further study and analysis. Combined with hazard and exposure information, the TRI Explorer can be a valuable tool for risk identification.

What are the limitations of TRI data?

TRI data do have certain limitations. TRI data reflect releases and other waste management of chemicals, and not exposures of the public to those chemicals. TRI data alone are not sufficient to determine exposure or to calculate potential adverse effects on human health and the environment. TRI data, in conjunction with other information, can be used as a starting point in evaluating exposures that may result from release and other waste management activities which involve toxic chemicals.

TRI ACCESS ON-LINE

How can I access TRI data on-line?

- **TRI Explorer** — EPA created the TRI Explorer <http://www.epa.gov/triexplorer/reports.htm> to provide access to TRI data that is both easy to understand and flexible to use. Currently, the TRI Explorer includes on- and off-site releases, transfers off-site, and other waste management data (i.e., recycling, energy recovery, treatment, and quantities released). The TRI Explorer will generate reports based on facilities, chemicals, geographic areas, or industry type (SIC code) at the county, state, and national level.
- **Envirofacts** — EPA created the Envirofacts <http://www.epa.gov/enviro/html/ef_overview.html> Warehouse to provide the public with direct access to the wealth of information contained in its databases (including TRI). The Envirofacts Warehouse provides environmental information from EPA databases on Air, Chemicals, Facility Information, Grants/Funding, Hazardous Waste, Risk Management Plans, Superfund, Toxic Releases, and other EPA databases. Envirofacts provides access to TRI data that is continually updated with the latest revisions.
- **The National Library of Medicine (NLM) TOXNET System** — NLM's TOXNET <http://toxnet.nlm.nih.gov/> System makes TRI data and health information accessible to concerned citizens and to businesses and organizations interested in environmental or public health issues. TOXNET offers state-of-the-art, user-friendly, on-line searching.

PUBLIC DATA RELEASE REPORTS

What is the TRI Public Data Release report?

The TRI Public Data Release report books are published each year and provide a general overview of that year's TRI data and information on trends. The State Fact Sheets are released with the Public Data Release report and provide a brief summary of the TRI data by State. These reports can be obtained electronically below or by calling EPA's National Service Center for Environmental Publications (NSCEP) at (800) 490-9198.

<http://www.epa.gov/triexplorer/>

- Public Data Release (PDR) Report <http://www.epa.gov/triinter/tridata/index.htm>
- TRI State Data Files <http://www.epa.gov/triinter/tridata/state_data_files.htm>

OTHER INFORMATION RESOURCES

What other information resources should I consider?

Release estimates alone are not sufficient to determine exposure or to calculate potential adverse risks to human health and the environment. TRI data, in conjunction with other information, such as the toxicity of the chemical, the release medium, and site-specific conditions, can be used as a starting point in evaluating exposures that may result from releases of toxic chemicals.

- **Hazard Information on Toxic Chemicals Added in 1995** <http://www.epa.gov/triinter/chemical/hazard_cx.htm> — EPA added 286 new chemicals and chemical categories to the EPCRA section 313 list. These chemicals were added to the list based on the statutory criteria in EPCRA section 313(d)(2): in short, acute human health risks, cancer or chronic (non-cancer) human health effects, and/or environmental effects.
- **Chemical Fact Sheets** <http://www.state.nj.us/health/eoh/rtkweb/rtkhsfs.htm> — EPA is continuing to develop Chemical Fact Sheets as part of its effort to provide the public with information on chemicals. The goal is to provide information summaries that supplement environmental release information for TRI chemicals. These summaries provide a chemical's identity and properties; how it is used; how exposure to it might occur; what happens to it in the environment; how it affects human health and the environment; and contact information for EPA offices and other groups.
- **Integrated Risk Information System (IRIS)** <http://www.epa.gov/iris/> — The Integrated Risk Information System (IRIS) contains summaries of hazard assessments and EPA regulatory information on over 500 specific chemicals. It is a key source for descriptive and quantitative hazard/risk information, such as oral reference dose and inhalation reference concentrations for chronic, non-carcinogenic health effects; oral slope factors and unit risk for chronic exposure to carcinogens; EPA drinking water health advisories; and summaries of EPA regulatory actions. The system is useful in the risk assessment process.
- **ATSDR ToxFAQsTM** <http://atsdr1.atsdr.cdc.gov/toxfaq.html> — The Agency for Toxic Substances and Disease Registry (ATSDR) ToxFAQsTM is a series of summaries about hazardous substances being developed by the ATSDR Division of Toxicology. Information for this series is excerpted from the ATSDR Toxicological Profiles and Public Health Statements. Each fact sheet serves as a quick and easy to understand guide. Answers are provided to the most frequently asked questions (FAQs) about exposure to hazardous substances found around hazardous waste sites and the effects of exposure on human health.
- **New Jersey Hazardous Substance Fact Sheets** <http://www.state.nj.us/health/eoh/rtkweb/> — Fact sheets for 1,234 individual hazardous chemicals that includes information relating to acute and chronic health hazards, identification, workplace exposure limits, medical tests, handling and storage, definitions, emergency response information for fires, spills and first aid, and other information.

<http://www.epa.gov/triexplorer/>

MORE INFORMATION

- **Contacts:** <http://www.epa.gov/tri/contacts.htm> Gives the names, addresses, and phone numbers of people in EPA and state environmental agencies to contact about TRI.
- **General Information:** <http://www.epa.gov/tri/whatis.htm> Explains more about the TRI Program and other resources available.
- **Regulations/Policy/Statute Page:** <http://www.epa.gov/triinter/lawsandregs/index.htm> Provides links to TRI regulations, recent chemical petition responses, EPCRA section 313, and the Pollution Prevention Act.
- **Metadata:** <http://www.epa.gov/triexplorer/metadata.pdf> Provides detailed metadata information for EPA's TRI Form R. (PDF Format, 26KB).

<http://www.epa.gov/triexplorer/>

Chapter 2

LEGAL ISSUES AND PRACTICAL IMPLICATIONS OF USING DESIGN-BUILD

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OVERVIEW

The design-build project delivery method is becoming increasingly popular with both the construction industry and project owners. It has the potential to save property owners significant time and money in delivering the end product. Those benefits apply with equal force to privately and publicly funded projects. However, when public dollars are involved, laws or regulations may determine whether and how a school district can use this type of project delivery method.[1]

Moreover, the design-build project delivery method has components that may or may not be advantageous to a particular district or a particular project. A school district must answer several important questions before it decides to use this method of project delivery, such as how to specify what the district wants, how to evaluate proposals, and whether the design-build process is right for a particular project.

This chapter addresses some of the considerations that may influence a school district's choice of the design-build project delivery method and provides pointers for how to use the process effectively.

1. As of 2000, only fifteen states allowed public agencies to utilize the design-build project delivery method without any restrictions. *The Design-Build Deskbook* 1-11 (John R. Heisse, II, ed., American Bar Association, 2d ed. 2000).

TERMINOLOGY

The terms "**design-build**" or "**design-build process**" refer to a project delivery method in which a single entity (the "design-build contractor") contracts to provide both design[2] and construction services to the owner of a construction project through the use of a single contract. The design and construction components of the project can proceed simultaneously. The design-build contractor may also contract with the owner to provide finance services, maintenance services, operations services, pre-construction services and other related services as a part of the arrangement.

Design-build is to be distinguished from "**design-bid-build**," which is the traditional method of project delivery involving separate contracts for design services and construction with separate entities and at separate points in time. (For more information about separately contracting for design services and construction services, see M. Levin, *Selecting and Contracting with Architects, infra,* at 45 and C. Goodrich, J. Kuhn and D. Osher, *Effective Construction Contracts Between Schools and General Contractors, infra,* at 173.)

Another project delivery method that varies from the design-bid-build process is known as the "**construction manager at risk**." The construction manager at risk project delivery method involves a separate contract for design services and a separate contract for construction services. The construction manager contractually assumes the responsibility to produce an end product for a certain cost.[3] The contract for construction services may be entered into at the same time as the contract for design services or at a later time. The construction manager may also contract to provide related services. (For more discussion about construction managers, see H. Brickman and J. Levi, *Selecting and Contracting with Construction Managers, infra,* at 103.)

"**Job-order contracting**" is a project delivery method involving a requirements contract for indefinite quantities of construction. The construction to be performed is specified in job orders issued during the term of the contract.

HOW DESIGN-BUILD WORKS

Design-build is sometimes referred to as a "turnkey" system of project delivery, with minimal involvement of the owner throughout the process. In reality, the actual extent of a school district's involvement in the process may vary widely.

A school district will start the design-build process by identifying its basic requirements or specifications for the project.[4] The amount of specificity the district uses varies based on the extent that the district wants to control (1) the process in general and (2) what the finished product will look like. For instance, a school district could simply specify square feet, location of the site and the intended use of the finished product. On the other end of the spectrum, a district may provide more detailed specifications, such as actual design, aesthetics, and materials. In some cases, the design-build process commences after a design consultant (previously and separately procured by the school district) has developed schematic drawings and more detailed specifications.

2. The term "**design services**" generally refers to architect services, engineering services, and landscape architect services.

3. *See* Tex. Att'y Gen. Op. No. JC-0224 (2000).

4. Some legislatures require that, before even starting the design-build process, the public entity must determine that that method of project delivery provides the "best value" compared to other methods. *See, e.g.,* Tex. Att'y Gen. Op. No. JC-0037 (1999) (addressing what a school district needs to do to determine whether to use design-build).

The next step in the process is to develop a solicitation that sets forth the district's specifications and the evaluation process the district will use to select the design-build contractor. The procurement process typically consists of two phases: first, a prequalification of all proposers—narrowing the field of those proposers that may be considered ultimately—and second, submission by the prequalified proposers of a detailed proposal.

The evaluation process for selecting a design-build contractor can be more difficult than that used with other project delivery methods because, depending on the degree of specificity in the solicitation, proposals may vastly differ, thus interjecting much subjectivity into the evaluation. Indeed, some owners use the design-build method for that very reason—to encourage new ideas and concepts and creative proposals that the owner had not previously contemplated.

At some point in the selection process, the design-build contractor agrees to produce the end product and provide additional services for a fixed price or guaranteed maximum price.

The organizational structure of the design-build contractor can vary. For instance, depending on laws affecting licensure and qualifications of a company, a contractor may subcontract with design professionals to provide design services, or include principals in its company who are design professionals. Other arrangements may include joint ventures between a contractor and design firm.

Once the design-build contract is awarded, both the design and construction phases of the project may proceed simultaneously. If the arrangement is a true "turnkey" arrangement, the district's involvement should be minimal throughout the remainder of contract administration.

APPLICABLE LAWS

The Power of a School District to Use Design-Build

"SOME OWNERS USE THE DESIGN-BUILD METHOD FOR THAT VERY REASON — TO ENCOURAGE NEW IDEAS AND CONCEPTS AND CREATIVE PROPOSALS THAT THE OWNER HAD NOT PREVIOUSLY CONTEMPLATED."

Generally, school districts and their governing boards only have those powers granted to them by a state constitution or statute.[5] As such, the ability of a school district to use the design-build process may depend on the statutory powers granted to the district by the state legislature.[6] Even if state laws may seem to authorize a school district to use the design-build process in general, there may be other laws elsewhere in the state statutory code that pose barriers to the actual use of the design-build process.

Procurement Laws

Procurement laws that govern how contractors, architects and engineers are selected with respect to publicly funded projects vary from state to state. Moreover, it is not uncommon that within a state, some governmental units may be allowed to use the design-build process, while others may not.

The most typical obstacles to use of the design-build process are laws that require a method for procuring design services that is different from the required method for procuring

5. 1 JAMES A. RAPP, EDUCATION LAW § 3.05[2][c][i] (1984) (Supp. 2001).

6. Some state legislatures delegate the power to enact rules relating to school district construction to a state agency. *See, e.g.,* ARIZ. REV. STAT. ANN. § 15-213. *See, also,* Ariz. Att'y Gen. Op. I99-015 (1999); 1990 Va. Rep. Atty. Gen. 64 (1990). While courts generally consider state attorney general opinions advisory only, courts also generally defer to such opinions unless they are clearly erroneous. *See, e.g.,* Community Redevelopment Agency of City of Los Angeles v. County of Los Angeles, 107 Cal. Rptr. 2d 693 (Cal. App. 2d Dist. 2001); 7 AM. JUR. 2d *Attorney General,* § 11 (2000).

construction.[7] Many states have laws tailored after the federal Brooks Architect-Engineers Act.[8] Depending on the state, these laws, referred to as "Mini-Brooks Acts," may apply to school districts. Like the Brooks Act, these Mini-Brooks Acts require that architectural and engineering services for publicly funded projects be procured through a qualitative process, and not on cost alone.[9] On the other hand, state law may only allow the procurement of construction through a competitive bidding process in which cost is the dispositive factor.[10] Because of the difference in the selection process for construction and the selection process for design services, it may be difficult to combine procurement of construction with procurement of design services.[11]

Some state legislatures and regulatory agencies have recognized this conflict and have enacted laws and regulations that allow the selection of the design-build contractor to include subjective factors, notwithstanding the fact that one component of the design-build process is procurement of the actual construction.[12] The North Carolina Attorney General has concluded that, even absent specific legislation addressing the Mini-Brooks laws, legislation authorizing public design-build contracts "superseded strict qualifications-based selection methods."[13]

State Licensing Laws

Some have argued that state laws that prohibit the unlicensed practice of architecture or engineering prohibit a construction company from contracting to design-build a project.[14] This same reasoning could be applied to argue that an architectural or engineering firm must be licensed as a contractor in order to provide design-build services.

Some state legislatures and regulatory bodies have amended their laws to allow a company to contract for and provide design-build services under a variety of arrangements. For instance, a design-build contractor may be allowed to subcontract for the design component, or provide design services so long as a principal in the firm is appropriately licensed, or enter into a joint venture with a design firm; in some cases, legislatures have simply ex-

7. *See* Advisory Opinion: Application of North Carolina's "Mini-Brooks Act" (N.C.G.S. § 143-64.3) to Subcontracted Professional Services and Design-Build Contracts, 2001 WL 729564 (N.C.A.G.).

8. 40 U.S.C. § 541 (the Brooks Act). The Brooks Act was originally enacted in 1949. In 1996, Congress enacted 41 U.S.C. § 253m, which allows the head of a federal executive agency to use a design-build process.

9. One could argue that, even with price as the only criterion, it may be possible to consider subjective qualifications in determining the "lowest responsible" bidder.

10. *See, e.g.*, N. J. STAT. ANN. § 18A: 18A-18.

11. City of Lynn Haven v. Bay County Council of Registered Architects, 528 So.2d 1244 (Fla. App. 1 Dist. 1988); W.V. Nelson Construction v. City of Lindstrom, 565 N.W. 2d 434 (Minn. App. 1997).

12. *See, e.g.*, ARIZ. REV. STAT. § 15-213; FLA. STAT. § 287.055 (Supp. 1996); OR. REV. STAT. § 137-040-0560(2), S.C. CODE ANN. §§ 11-35-3010, 3020(1) and 23 S.C. CODE ANN. REGS. § 19-445.2095; TEX. ED. CODE ANN. § 44.036; VA. CODE ANN. § 11-41.2. *See also* J.F. Ahern Co. v. Wisconsin Bld'g Comm., 336 N.W. 2d 679 (Wis. Ct. App. 1982) (statute permitting building commission to waive statute governing competitive bidding requirements in favor of innovative design and construction processes if the latter will make better use of the resources and technology of the building industry upheld).

13. 2001 WL 729564 (N.C.A.G.).

14. *See, e.g.*, Charlebois v. J.M. Weller Associates, 72 N.Y.2d 587, 531 N.E.2d 1 (N.Y. Ct. App. 1988) (design-build contract was not void as a matter of public policy because contract actually required that design services were to be performed by an independent third party). *See also* Consulting Engineers Council v. State Architects Licensure Board, 560 A.2d 1375, 1379 (Pa. 1989) (Pennsylvania law "allows an architect to work for a business that is not an architectural firm to practice architecture for the internal business purposes of his employer, but the employer is not free to market architectural services.").

empted from licensure certain activities pertinent to design-build.[15]

State Laws that Dictate Who May Provide Services to Publicly Funded Projects

Some states have laws that apply to publicly funded projects that require that a licensed contractor supervise all construction or that only allow a licensed architect to provide architectural services for the design component of the project.[16] The same sort of statutory solutions that address licensing restrictions may be enacted to address these requirements.

ADVANTAGES AND DISADVANTAGES OF DESIGN-BUILD

Advantages

The design-build process offers many advantages to school districts that want to reduce manpower costs and the time it takes to construct a school. Because the design and construction components can proceed concurrently, the project can be completed more quickly than the traditional design-bid-build project delivery method. Moreover, throughout the project, district personnel can deal with one contractor (and likewise, one contractor representative). As a result, the number of persons who must be involved in day-to-day communication about the project and in decision-making as the project proceeds is reduced.

ADVANTAGES OF DESIGN-BUILD

- Faster project completion
- Less complicated communication and decision making
- Easier to change/modify design after construction starts
- Reduced cost overruns and delays
- More creativity
- Easier problem solving

Theoretically, decisions, such as the necessity of design modifications and changes discovered after construction has commenced, can be made more quickly under the design-build process because the design phase of the project is proceeding concurrently. In turn, cost overruns and delays may be reduced significantly, compared to overruns and delays that require construction to stop while design problems are worked out.

The design-build process also may encourage creativity in the design of the end product, if the specifications allow. The process encourages proposers to develop and propose innovative concepts, while giving the district a clear concept of what these proposals will cost.[17]

The design-build method allows a school district to select a contractor and proposal on factors other than price alone. Thus, if a district determines that, regardless of price, a particular proposal is superior to a less costly one, the district has the discretion to select the proposal that best fits its needs based on considerations other than cost.

Finally, just as there are fewer entities that the owner has to deal with, so too are there fewer entities responsible for problems. The

15. *See, e.g.*, ARIZ. REV. STAT. ANN. § 32-141; CAL. BUS. & PROF. CODE, § 5537.2; COLO. REV. STAT. § 12-4-110; FLA. STAT. §§ 481.229 and 489.103 (Supp. 1996). A detailed compilation of licensing laws that affect design-build can be found in R. Cushman & K. Taub, *Design-Build Contracting Handbook* § 3.5 (1992 & 1994 Supp.).

16. *See, e.g.*, ALA. CODE § 34-11-10 (1991).

17. The design-build process also works well with projects that have repetitive elements, such as schools with standardized design components.

frequent finger pointing that goes on between the design professionals and the contractor when a problem arises is eliminated. The design-build contractor typically warrants its work, including the design of the project. If there are problems relating to the project—whether caused by the plans and specifications or the actual construction—the district will look to the design-build contractor.

Disadvantages of the Design-Build Process

Depending on an owner's point of view, some of the perceived advantages of the design-build process may in fact be considered drawbacks. For instance, while the method allows creative and innovative proposals, the wide range of possible proposals makes it difficult to make "apples to apples" comparisons of proposals.

A related potential problem arises from the degree of detail that must be included in a design-build contractor's proposal because, just as the owner wants to encourage creative proposals, a contractor's submission must be detailed enough to give the owner a good idea of what is being proposed. It is often very costly for a design-build contractor to adequately prepare a proposal given the many unknowns the contractor must anticipate and the amount of detail necessary to give the owner a good idea of what is being proposed. This potential cost, in turn, may narrow the pool of design-build contractors that submit proposals.

DISADVANTAGES OF DESIGN-BUILD

- More difficult to compare proposals
- Costly to prepare proposals
- No checks and balances between architect and contractor
- Profit incentive for contractor to cut corners or overdesign
- Fewer insurance and bonding products available

There is also an inherent potential for a conflict of interest in the design-build arrangement. The traditional design-bid-build method theoretically has a built in system of checks and balances; it has a design professional who will point out contractor errors and the contractor who will point out design errors. Those checks and balances are absent when the design and construction components are performed by one contractor. One could argue that, because the design-build contractor typically guarantees a price for the project, the contractor may be motivated to cut corners to maximize its profits or overdesign the product to inflate the cost of the project.[18]

Another concern (which should diminish with the increased demand for design-build) is the extent of insurance and bonding products available to the design-build contractor. Under the traditional design-bid-build process, the design professional and the contractor each obtain insurance coverage and bonding to cover their respective responsibilities on the project. In the past, the actual insurance coverage and surety bonds available to the design-build contractor have been limited and may be a point that contractors will want to negotiate depending on the products available in the market.

18. *See* Combustion Engineering v. Miller Hydro Group, 13 F.3d 437 (1st Cir. 1993); Aiken County v. B.S.P. Division of Environtech Corp., 657 F. Supp. 1339 (D.S.C. 1986); *rev'd in part, aff'd in part,* 866 F.2d 661 (4th Cir. 1989).

WHEN TO USE THE DESIGN-BUILD PROCESS

The Federal Acquisition Reform Act of 1996[19] (FARA) sets forth the factors a federal contracting officer should consider in deciding whether to use the design-build process. Likewise, many state legislatures have spelled out the relevant considerations a public agency should make as a prerequisite to using the design-build process.[20] The following criteria are compiled from FARA and from statutes adopted in Arizona and South Dakota:[21]

- ☐ Extent to which the public agency can adequately define the project requirements.
- ☐ Time constraints for delivery of the project, i.e., is design-build preferable because the project can be delivered faster?
- ☐ Capability and experience of the public agency's personnel with the design-build process.
- ☐ Suitability of the project for use of the two-phase selection procedures inherent in the design-build process.
- ☐ Capability of the public agency's personnel to manage the two-phase selection process.
- ☐ Suitability of the project for use of the design-build process in the areas of time, schedule, costs and quality.
- ☐ Capability of the purchasing agency to oversee the project with persons who are familiar with the design-build process.
- ☐ Repetitive or incidental nature of the project design.
- ☐ Simplicity or complexity of the project features.
- ☐ Degree of coordination of design and construction expertise required by complexity of the project.
- ☐ Whether the project requires early cost commitments.
- ☐ Whether the scope of the project can be defined at an early stage and the public agency is able to specify all requirements.

19. 41 U.S.C. § 253m(b).

20. Sometimes the school district is required by statute to determine that the design-build process provides the "best value." *Tex. Att'y Gen. Op. No. JC-0037, supra* note 4.

21. *See* 41 U.S.C. § 253m(b); ARIZ. REV. STAT. § 28-7364; S.D. CODIFIED LAWS § 5-18-26.

PROCUREMENT OF A DESIGN-BUILD CONTRACTOR

The Solicitation

The typical two phase procurement of a design-build contractor consists of two stages. In the first stage the selection team evaluates the qualifications of responding firms and compiles a short list of firms in accordance with technical and qualifications-based criteria. During the second stage the selection team considers more detailed proposals of those on the short list.

Some statutes prohibit the selection team from requesting or considering fees, price, or any other cost information in the selection of the short list or ranking of the proposers. Some solicitations for projects using the design-build process provide that, after completion of any discussions, each proposer must submit separately its final technical proposal and its price proposal.

It is not uncommon for the owner to pay a fee to each unsuccessful proposer that made the short list to compensate the proposer for the work done in connection with the proposal. (If the agency awards no contract, the fee is given to all short-listed proposers.) The fee must be published in advance in the solicitation and can be a sum certain or a sum equal to a stated percentage of the purchasing agency's project budget. In return for payment of the fee, the purchasing agency obtains the right to use the ideas or information contained in the proposals. A proposer may reject the fee and keep the use of its ideas and information.

Some state legislatures and agencies have codified some of the information,[22] other than the usual boilerplate, that should be included in the solicitation of a design-build contractor. (See box on next page.)

The Evaluation

The factors that the school district will use to evaluate proposals should be included in the solicitation. Some evaluation factors a school district should consider include the following:

- Proposer's demonstrated compliance with the design requirements.
- Proposer's ability to comply with the purchasing agency's project schedule.
- Quality of the proposer's management plan.
- Proposer's financial capability.
- Qualifications of the proposer (including experience working with school districts on similar projects).
- Qualifications of the specific individuals who will be assigned to the project and their roles with respect to the project.
- Long-term durability of the project.
- Ability of the proposer to meet schedules.
- End product that is proposed.

22. *See, e.g.*, ARIZ. REV. STAT. §§ 28-7365, 34-603, 41-2578; ILL. COMP. STAT. 70 § 3615/4.06; NEV. REV. STAT. § 338.1725; OHIO REV. CODE ANN. § 5517.011; TEX. ED. CODE ANN. § 44.036.

DESIGN-BUILD SOLICITATION INFORMATION

A school district may want to consider incorporating these types of information in its solicitation, even if there is no statutory requirement to do so.

- ☐ Project schedule and project budget or, in the case of a project that includes services beyond completion of construction, the life cycle budget for the procurement.
- ☐ Minimum qualifications of the design-build contractor.
- ☐ Scope of work statement and schedule, which may include programmatic, performance and technical requirements, conceptual design, specifications and functional and operational elements for the delivery of the completed project.
- ☐ Form of contract to be awarded.
- ☐ Evaluation criteria, including the weight or relative order, or both, of each criterion. (See previous page for possible criteria.)
- ☐ How price is to be quoted, such as a fixed price or guaranteed maximum price.
- ☐ Management needed to bring the project to completion, including where appropriate, calendar and anticipated relocation of classes during construction.
- ☐ Maximum time allowable for design and construction.
- ☐ Agency's estimated cost of design and construction.
- ☐ Whether the proposal process will be segmented into two parts, a technical proposal and a price proposal.
- ☐ Selection criteria for compiling a short list and the number of firms to be included on the short list.
- ☐ Description of the phase two proposal process and the requirements for those short-listed proposers.
- ☐ What information the technical proposal must include, such as a schedule, schematic design plans and specifications, technical reports, calculations, permit requirements, applicable development fees and other data
- ☐ What information the price proposal must include, such as all design, construction, engineering, inspection and construction costs of the proposed project.
- ☐ Name(s) and qualifications of the agency's personnel who will be assigned to the project and their roles with respect to the project.
- ☐ Proposed plan of the agency to manage the project.

THE DESIGN-BUILD CONTRACT

Standard Forms Available to the Project Owner

There are several sources of standard forms of contracts that a school district as the project owner may want to consider using, depending on its particular needs. These sources are listed in the table at the end of this chapter.

Specific Areas of Concern

- **Defining the Role of the School District with Respect to the Project.**

As discussed above, under a design-build arrangement, the extent of involvement of the owner or the owner's representative can vary greatly. The school district should identify its role in matters such as approving pay applications, obtaining governmental approvals, approving changes in design, relocating equipment and personnel during construction, if applicable, obtaining environmental reports, stopping work, inspecting work, and facilitating meetings between the contractor, the district and the community.

- **Avoiding the "Bait and Switch"**

The evaluation process involved in selecting the design-build contractor by its very nature involves a great deal of interaction between the district's personnel and persons representing the proposer. Naturally relationships between these individuals will begin to form during that process.

In today's market, the proposer who wants the job will bring out all the "bells and whistles" possible to impress those making the selection. The proposer may also assign its most talented personnel to make the presentations. All of this marketing strategy can lead to misunderstandings later if, once the contract is awarded, the proposer's employees involved in the proposal process are nowhere to be seen. This possibility is even stronger in a design-build scenario because the selection process can involve minimal and subjective specifications.

"ONE OF THE ATTRACTIONS OF THE DESIGN-BUILD PROCESS IS THAT IT IS SUITED TO PROJECT DESIGNS THAT WILL BE USED MORE THAN ONCE."

To avoid misunderstandings the school district should require the proposer to identify in its proposal the specific individuals who will be assigned to the project, their qualifications and roles with respect to the project. In the actual contract, the district also may want to include a clause that requires it be notified if certain key personnel assigned to the project are to be transferred and allows the district to be involved to some extent in selecting their replacements.[23]

- **Ownership of and Access to the Plans Once the Project is Completed**

One of the attractions of the design-build process is that it is suited to project designs that will be used more than once. Thus, a fast growing school district may want to use the same school design it used in a design-build project later as a template for new schools it must build in a short period of time.

23. It is unreasonable for a district to expect to have the ultimate say in how a design-build contractor staffs its projects or who it employs. However, it is not unreasonable that the district be assured that the replacement be qualified and able to work with the district.

Most design professionals want to ensure they own the plans and that the plans cannot be used without their permission. The plans are their "bread and butter," and they want to be paid when the plans are used. Moreover, they would argue that they risk liability if someone alters their plans while using them. Further, the design documents as well as the design itself are subject to the protections of copyright laws.[24]

The school district, on the other hand, paid for the plans and may want to have the ability to use them in the future with respect to the same project, some other phase of the project or a completely different project.

The contract should address the following:

- Who owns the plans?
- Does the district have the right to use the plans after completion of the project? If so, under what conditions?
- May the district use the plans for completion, renovation, or remodeling of the same project?
- May the district use the plans for a later phase of the project?
- May the district use the plans for a completely different project?
- Does district use of the plans require the design-build contractor's permission? If so, is there a clause that says that permission cannot be unreasonably withheld?

With regard to these issues the standard form contracts published by the Associated General Contractors of America are most owner friendly.[25]

- **Handling Change Orders and Construction Change Directives**

Some state laws regulate how change orders and construction change directives are to handled, which are unique to governmental owners. For instance, in Arizona, a school district's governing board must approve a change order once the amount of the changes in the aggregate reach a certain percentage of the cost of the project.[26] In such a case, the school district should ensure that the contract addresses any special requirements that apply to it as a public entity that differ from standard procedures used in the private sector.

Another problem pertaining to change orders arises from the fact that, by the very nature of the design-build process, plans will not be finalized at the time price is established. Thus, disputes may arise later on about whether an item of work falls within the scope of work. It is helpful to preserve the information on how price was established to refer to later in the event of a dispute over the scope of work.

- **Security and Insurance**

Because the design-build contractor performs both design and construction functions, there may be some confusion about the form of security against loss that the contractor should be required to provide.

Under the design-bid-build method, typically, the contractor is required to provide security in the form of a surety bond.[27] (See L. Slutzky, *School Construction Bidding Issues, infra,* at 161 for more discussion of construction bonds.)

24. 17 U.S.C. § 102(a)(8). *See* Hunt v. Pasternak, 192 F.3d 877 (9th Cir. 1999).

25. THE DESIGN-BUILD DESKBOOK, *supra,* note 1 at 2-31.

26. ARIZ. ADMIN. CODE R7-2-1008.

27. Generally, a suretyship contract is an accessory promise by which the surety binds itself to fulfill the obligations of the principal, should the principal fail to perform. *Mariner's Village Mandeville, Inc. v. Fama,* 671 So.2d 1015, (La. App. 4 Cir. 1996).

The surety bond, however, does not insure the adequacy of the design. In this traditional method, the design professional is required to carry professional liability insurance. These are two very different methods of guarding against risk of loss. It is quite likely that the surety bond does not cover the risk of negligent design.

Under the design-build process, the contractor performs functions previously covered by these separate types of security. The best solution is for the design-build contractor to obtain a surety bond that covers not only construction, but also the design component of the project. If not, in the event of liability, the surety may attempt to claim the insurer is responsible and vice-versa.

This problem is illustrated by the facts of *Nicholson & Loup v. Carl E. Woodward, Inc.*[28] In that case, an owner of a supermarket building that suffered severe settling sued the contractor that designed and built the supermarket, the architect employed by the contractor, the contractor's surety and the geotechnical engineer that provided the subsoil report.

The contractor argued that liability was based on design, and not construction defects, and that the performance bond was intended to cover only construction defects. The court held that the terms of the performance bond were to secure performance of the entire contract, including design responsibilities and held the surety liable, stating, "since the contract covered by the accessory promise placed both design and build responsibilities on the principal, the surety contract, when interpreted strictly, must be construed to cover both aspects of this project."[29]

- **Indemnifying Against the Risk of Loss**

Some states have "anti-indemnity" laws that do not allow an owner or a subcontractor to indemnify or hold harmless a contractor or architect from or against liability for loss or damage resulting from the negligence of the contractor or the contractor's agents, employees or indemnitee.[30] The rationale behind these laws is that a party at fault should not be allowed to escape liability by contractually agreeing that the financial responsibility for such negligence will fall on an innocent party.

> "THE BEST SOLUTION IS FOR THE DESIGN-BUILD CONTRACTOR TO OBTAIN A SURETY BOND THAT COVERS NOT ONLY CONSTRUCTION, BUT ALSO THE DESIGN COMPONENT OF THE PROJECT."

Such laws may or may not apply to the design-build contractor, based on the language of the statute. In all cases, when a contractor proposes an indemnity clause, the school district should ascertain whether such a clause is in its best interests. Any indemnity agreement requires careful consideration.

CONCLUSION

School administrators and board members across the country are struggling to keep up with the demands of high enrollment and the need to construct new school buildings or renovate and remodel aging school buildings. School districts can be stretched thin to meet these demands. They must provide the personnel to supervise these projects and deliver the project in short order. The design-build process, if it is permitted by state law, may be the answer and warrants serious consideration.

28. 596 So.2d 374 (La. Ct. App. 1992).

29. *Id.* at 390.

30. *See, e.g.*, ARIZ. REV. STAT. § 34-226; N.C. GEN. STAT. § 22B.

STANDARD FORMS OF OWNER AND DESIGN-BUILDER CONTRACTS*

American Institute of Architects (AIA)	AIA Document A191, Standard Form of Agreement between Owner and Design/Builder (1996) AIA Document A491, Standard Form of Agreement between Design/Builder and Contractor (1996) AIA Document B901, Standard Form of Agreement between Design/Builder and Architect(1996)
Associated General Contractors of America (AGC)	AGC Document No. 400, Preliminary Design/Build Agreement between Owner and Design/Builder (1999) AGC Document No. 410, Standard Form of Design/Build Agreement and General Conditions between Owner and Design/Builder (Where the Basis of Payment is a Lump Sum Based on an Owner's Program Including Schematic Design Documents) (1999) AGC Document No. 415, Standard Form of Design/Build Agreement and General Conditions between Owner and Design/Builder (Where the Basis of Payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price) (1999)
Design/Build Institute of America (DBIA)	Design/Build Manual of Practice Document No. 520, Standard Form of Preliminary Agreement between Owner and Design/Builder (1998) Design/Build Manual of Practice Document No. 525, Standard Form of Agreement Between Owner and Design/Builder-Lump Sum (1998) Design/Build Manual of Practice Document No. 530, Standard Form of Agreement between Owner and Design/Builder-Cost Plus Fee with Option for a Guaranteed Maximum Price (1998) Design/Build Manual of Practice Document No. 535, Standard Form of General Conditions of Contract between Owner and Design/Builder (1998)
Engineers Joint Contract Document Committee (EJCDC)	EJCDC Document No. 1910-40-A, Standard Form of Agreement between Owner and Design/Builder Where Basis of Price is Stipulated Price (1995) EJCDC Document No. 1910-40-B, Standard Form of Agreement between Owner and Design/Builder on the Basis of Cost Plus (1995) EJCDC Document No. 1910-40, Standard General Conditions of the Contract between Owner and Design/Builder (1995)

* *The Design-Build Deskbook*, Ch. 2 (John R. Heisse, II, ed., American Bar Association, 2d ed. 2000) provides helpful comparison of the clauses in these documents.

Chapter 3

SELECTING AND CONTRACTING WITH ARCHITECTS

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For any school construction project, it is critically important that school districts know how to select a qualified architect, school districts understand the nature of its relationship with the architect, and the school district be prepared to negotiate an appropriate contract with the architect. This chapter addresses each of these issues.

Essential to these issues is the contract between the school district and the architect. The contract ultimately defines the relationship between the parties. The willingness of the architect to accommodate the needs of the school district through appropriate provisions in the agreement should be considered in the selection of the architect. The agreement ensures, among other things, that the obligations of the parties are properly established and allocates various risks of the project between the architect and the school district. As a matter of practicality, where the architect performs more services and assumes greater risks, the architect's fees will likely increase. Similarly, to the extent that the services and risks of the architects are minimized, and are consequently assumed by the contractor and/or the school district, fees should correspondingly decrease.

Before proceeding further into these topics, several disclaimers must be noted. First, the laws of individual states have not been reviewed and any specific suggestions or recommended contractual provisions in this chapter may not comply with state law. Any action taken by a school district with respect

to the selection of or contractual relationship with architects must be reviewed carefully with school district legal counsel to ensure conformity with state law. Secondly, unusual or unique situations generally will not be addressed. For example, if the school district uses multiple prime contractors, provisions in addition to the ones discussed here will be necessary. If the project has unique features, provisions which address those special features should be included in the agreement.

SELECTING AN ARCHITECT

The success of any building project largely depends on the capability of the architect. The capability of an architect must be measured in several ways—competency, fiscal viability, human resources and time and willingness to serve. Fiscal viability is important not only with respect to the ability of the architect to perform the work, but also from a liability standpoint should claims be made as a result of the architect's work. The capabilities of architects, using these standards, vary widely from firm to firm, and school districts must investigate these differences to ensure that the right architect is selected.

Initial Proposal

Except where state law establishes selection procedures, school districts have fairly wide discretion in deciding how to select an architect. Where state law does not require bidding, the school district should request proposals and information from three to five firms. School districts should ensure that their selection process complies with any laws requiring that minority and women-owned firms are provided a meaningful opportunity to compete for and obtain architectural contracts.

School districts should request certain basic information from each firm:

BASIC INFORMATION TO REQUEST

- Firm name; addresses of all firm offices; and telephone number;
- Structure and size of firm, i.e., sole proprietorship, partnership, corporation;
- Years firm has been in business;
- Firm's financial condition including current financial statement and balance sheet;
- Names of principals in firm;
- Names of those who will be working on the project and copies of their licenses, registrations or certifications;
- Educational and experiential background of principals and those who will be working on project;
- Qualifications for specific project;
- Names of owners of similar projects who can be contacted as references;
- Listing of the projects currently under contract;
- Listing of any actions taken by any regulatory agency against or litigation involving the firm or its agents or employees with respect to any work performed;
- All insurances that the firm has that would apply to the work; and
- An explanation of how the firm provides quality control in each phase (schematic design, design development, construction documents, bidding or negotiation, construction) of the project.

Interviews

After reviewing the proposals, a decision should be made as to which architects to interview. The persons who will be involved in the interview process may be drawn from the school board, the administration, and perhaps may include an educational consultant. A representative from the school district's business office should be part of the interview team because the business office will be responsible for payments to the architect and contractor. If interviews are conducted, the architects should be advised reasonably in advance of the time of the interview and what will be expected at the interview. The interview should include a discussion of the following:

INTERVIEW QUESTIONS

- Information submitted with the proposals;
- Nature and scope of the project;
- Similar jobs in which the architect has been involved;
- Time requirements for the job;
- Architect's view of his role during construction, i.e., owner's representative or impartial observer; what contractual provisions will describe the architect's role;
- Architect's capability to handle all aspects of the project;
- Any special requirements the architect will demand;
- Any amendments the school district will require to the standard form of agreement between the school district and the architect; and
- Architect's fee schedule and estimated cost of services.

Reference Check

Once the foregoing information is obtained, owners who have previously used the architect's services should be contacted. Specific questions with respect to the following topics should be explored:

REFERENCE QUESTIONS

- Accuracy of the architect in estimating both cost and timing;
- Freedom of the architect's buildings from problems;
- Freedom of heating and air conditioning systems from maintenance problems;
- Promptness and efficiency of the architect in responding to problems;
- Sufficiency of or any problems resulting from the bidding or construction documents;
- Any regulatory agency citations against the architect or involvement in any disputes or litigation; and
- Architect's record in producing designs and documents in a timely fashion.

The departments of education of some states maintain records on architects in the state. School districts should check any available records.

Finally, representatives of the school district may want to visit the architect's office to evaluate the architect's ability to perform the work.

Relationship Between Architect and School District

The construction of a school is inherently an extremely complex process. It is further complicated by the competitive relationships among

the various parties involved in the project, some of whom may have been strangers to one another prior to the award of the construction contracts. In the best of circumstances, each is driven by a variety of impulses, including economic self interest and professional pride. For the project to be constructed successfully, however, the various parties must work as a team, and to a certain extent, compromise their individual interests for the common goal: to build the school on time in accordance with the plans and specifications set forth in the contract documents at or below the budgeted amount.

There are two principal views of the architect's role in this process. Many owners view the architect as their representative on the project. Although an independent contractor, the architect is considered in practical, if not legal, terms as the owner's agent. In the owner's view, the architect is employed to carry out its wishes.

Architects, however, often view their role differently. The standard contract documents from the American Institute of Architects (AIA), for example, in defining the role of the architect, owner and contractor, allocate responsibility (and therefore risk and liability) in such a way as to minimize the responsibility of the architect. During the construction phase, particularly, architects frequently consider themselves to be judges of the performance of both the owner and the contractor.

This tendency of architects to see their role less as the owner's representative on the project and more as an independent observer of the work has caused many owners to employ a construction manager or a clerk of the works. (For more information about construction managers, see H. Brickman and J. Levi, *Selecting and Contracting with Construction Managers, infra*, at 103.) Architects also have created an economic demand for construction managers and clerks of the works by limiting the scope of their "basic" services and shifting services previously considered "basic" to "additional" services for which they charge an additional fee. School districts, therefore, must seriously consider the following issues as they begin planning for a construction project:

- Whether they want the architect to serve as a representative of the owner on the project or to serve more as a neutral party during the construction phase;
- Whether they want to expand the scope of the architect's basic services;
- Whether they want to assign school district staff and/or employ a clerk of the works to supervise the construction phase; and
- Whether they want to employ a construction manager.

After answering these questions, the owner needs to discuss its expectations for the role and responsibilities of the architect with the architectural firms it is considering for the project to ensure a meeting of the minds. Some architects may be uncomfortable assuming a role aligned more toward the owner's interests, and some may increase their fees substantially if they are asked to increase the scope of their basic services. Others may not.

CONTRACTING WITH AN ARCHITECT

Approaches to Negotiating an Architect's Agreement

Typically, very little in the way of actual "negotiation" occurs between owners and architects. Instead, once the parties agree on the principal areas of concern, the architect will submit a complete contract document, usually the form contract prepared by the American Institute of Architects. All too often, owners do not read or adequately understand the terms and conditions of the AIA standard form agreement. They

simply sign the form presented to them without a mutual agreement on the role and responsibilities of the architect. This can lead to later misunderstandings and expense.

The attorney for the school district must become familiar with the terms and conditions of the owner-architect agreement and advise the school district as to its contents. The attorney should ensure that the school district understands the role and responsibilities of the architect as set forth in the contract. If the owner is dissatisfied with the contract, the attorney should assist the owner in negotiating a new or amended contract with the architect. If the usual scenario is played out, the school district will not be in a strong bargaining position to insist upon significant changes to the AIA standard form. For example, any changes proposed by the school district that appear to increase the architect's responsibilities will be met with a response that the architect agreed to the compensation package on the understanding that the added services would not be required.

To avoid that outcome, the school district can gain bargaining power by preparing its own contract document to be used with the architect before contacting any architects. Prospective architects should be given a copy of the contract with the request for proposals. Depending upon the negotiation style and objectives of the school district, the request for proposals should state either that only compensation and scheduling are subject to negotiation or that questions and proposed changes will be considered as part of the selection process. In essence, this differs little from contracting with contractors asked to bid on specific and detailed specifications. This approach offers the school district the best bargaining position and allows the school district to better compare competing architectural firms. Using this approach, the competing architectural firms will be submitting proposals on essentially the same set of services.[1] School districts should keep in mind, however, that architects consider the expense of submitting a proposal. If massive changes in standard form contracts are prepared or if the school district's documents are specified, some architects may decline to submit a proposal, especially on smaller projects.

"THE SCHOOL DISTRICT CAN GAIN BARGAINING POWER BY PREPARING ITS OWN CONTRACT DOCUMENT"

Approaches to Formulating the Terms of an Agreement

The agreement with the architect can be formulated in any number of ways. Certainly, one can start from scratch, but a number of form contracts are also available. Some states have developed standard form agreements for public construction contracts. The Association of General Contractors (AGC) has published a set of construction documents which includes an owner-architect agreement.[2] The National

1. On July 5, 1990, the United States Department of Justice filed against the American Institute of Architects a civil anti-trust suit alleging that it unreasonably restrained price competition in the sale of architectural services. The complaint alleged that the AIA and co-conspirators entered into an unlawful agreement to prohibit AIA members from engaging in competitive bidding, discounting fees, or providing free services. A consent decree resolving the suit enjoins the AIA and its approximately 280 local and state components from having any code of ethics or statement that prohibits or restrains AIA members from engaging in competitive bidding, discounting, or providing free services or that states or implies that any of those practices are unethical, unprofessional, or contrary to any AIA policy. The consent decree should make it easier for school districts to negotiate changes to the standard form of agreement.

2. Click on AGC200 Series at http://www.agc.org/Marketplace/contract_documents.asp

Society of Professional Engineers and the American Society of Civil Engineers have produced the Engineers Joint Contract Documents (EJCDC).[3] However, the most widely used and generally accepted forms are those produced by the American Institute of Architects (AIA).[4]

Unless state law provides otherwise, school districts may want to begin with the AIA documents and make necessary changes to protect their interests. Beginning with the AIA documents has several advantages:

a. Architects, contractors and the courts are familiar with the language of the AIA contract documents. This generally means less confusion and misunderstanding of the terms and conditions of the contract. In addition, radical changes in the duties and responsibilities of the parties may increase the cost of the project or discourage firms from responding to the school district's request for proposals. Even if the owner does not intend to increase an architect's responsibilities, simply the risk of an adverse interpretation of the contract by the courts may cause the architect to raise his compensation to cover the increased risk exposure.

b. The AIA contracts are comprehensive. Reviewed approximately every ten years, the forms are amended to reflect the state of the art in the construction industry in terms of both technology and the delivery of services, and to incorporate changes in the law. As a result, they address almost every contingency which could arise on a construction project.

c. The AIA contracts are a family of contracts. Although each addresses a different contractual relationship, they are consistent with one another. (While in general this is an advantage, an owner who wants to amend one of the agreements will have to locate, identify and amend all similar clauses in each contract within the family of contracts.)

d. The AIA seeks comments and suggestions from all interested parties within the construction industry, both owners and contractors, during the development of its standard forms. The AIA documents reflect, to a degree, the views of the different parties.

Although there is good reason to begin the development of the terms and conditions of the architect's agreement with the AIA documents, many important changes must be made to protect properly the vital interests of school districts. Changes are necessary because the AIA forms generally favor the architect's position which often is at odds with that of the school district.

Determining what changes are necessary will be affected by the standard form selected as the base document. As noted above, the AIA periodically reviews and modifies its standard contract documents. In 1997 the AIA published a new owner-architect agreement (Document B141). The 1997 agreement significantly altered the form, structure and substance of the previous 1987 contract document. One of the major revisions made by the AIA in 1997 was to divide the standard form of agreement into separate agreements. One is titled, "Standard Form of Agreement Between Owner and Architect," and the second is titled, "Standard Form of Architect Services: Design and Contract Administration." As part of the division of the agreement into two documents, the parties are offered many more choices in terms of which services the architect will be providing. In the explanatory material accompanying the new agreement, the AIA stated:

> Many significant changes from the previous edition were made in the format and content of B141-1997 (i.e.,

3. Click on contract documents at http://www.pubs.asce.org/contract.html

4. Click on contract documents at http://www.aia.org

the new agreement forms published by the AIA.) A key change between the 1987 and the 1997 editions of B141 is that B141 no longer is a unitary standard form. Rather it is composed of two standard forms: the Standard Form of Agreement Between Owner and Architect and the Standard Form of Architect Services. Descriptions of the architect services to be provided under the agreement have been removed from the standard form of agreement between owner and architect and have been placed instead in a new form —the Standard Form of Architect Services. Other key changes are the elimination of phases of services and the designations "basic services," "additional services," "contingent additional services," and "optional additional services." In B141-1997, services are divided into categories to delimit them according to type or task rather than time sequence, and are either included in or excluded from the agreement.

B141-1997 started towards its present form when the AIA practice and prosperity initiative began a redefinition of fundamental precepts of practice. * * * Key to developing such a level of professional service are close communication, careful negotiation of responsibilities and compensation, and mutual understanding and trust.

Although some of the changes made in the 1997 version corrected and cured many of the fundamental flaws of the 1987 version, the new document still has substantial weaknesses from the owner's point of view. In fact, it is this writer's opinion that the overall structure and comprehensive nature of the 1987 edition of the B141 make it a superior document for a school attorney to use as the starting point in drafting a proposed contract with an architect. However, school attorneys should be advised that the AIA views use of the 1987 edition to be a violation of its copyright interests, because AIA no longer issues licenses to use the 1987 version (and all current licenses will expire in 2002).

Where school districts do not put forth their own proposed agreement, architects will likely present districts with the B141-1997 as the standard form. The following two-part analysis should assist school attorneys in either drafting their own agreement or in negotiating modifications to the B141-1997. The first part tracks the language and the numbering of the 1987 agreement. Where there is a corresponding or similar paragraph in the 1997 version, the new number is indicated in brackets at the end of the paragraph clause so that school attorneys may determine whether the suggested revisions are appropriate to the 1997 document. Footnotes are used to indicate significant changes between 1987 and 1997 language. Suggested revisions or additions are shown as underlined text. Deletions are shown by ~~strikeout~~. The second part addresses the 1997 form separately in an issue-driven analysis rather than through recommendations to modify specific language.

ANALYSIS OF THE AIA DOCUMENT B141, OWNER-ARCHITECT AGREEMENT

Overview

The AIA Document B141-1987, Owner-Architect Agreement is divided into 12 separate articles titled as follows:

Article 1.	Architect's Responsibilities
Article 2.	Scope of Architect's Basic Services

Article 3.	Additional Services
Article 4.	Owner's Responsibilities
Article 5.	Construction Cost
Article 6.	Use of Architect's Drawings, Specifications and other Documents
Article 7.	Arbitration
Article 8.	Termination, Suspension or Abandonment
Article 9.	Miscellaneous Provisions
Article 10.	Payments to the Architect
Article 11.	Basis of Compensation
Article 12.	Other Conditions or Services

Article 1 essentially states that the architect will provide the services identified in the contract consistent with professional skill and care. Article 2 describes the services that will be provided by the architect as part of the architect's basic price and without additional charge. Article 3 describes those services that will be performed by the architect, but only for additional compensation. The additional services are generally divided into two kinds—services necessary due to circumstances beyond the control of the architect and services that may be requested by the school district, but which may not be necessary for the completion of the project. With respect to the former, they will be provided automatically by the architect and must be paid as an extra by the school district unless the school district promptly notifies the architect not to perform such services. As to the latter, the architect will perform the services only if requested by the school district.

Article 4 outlines the responsibilities of the owner. Generally, the owner is required to meet with the architect and provide various kinds of information necessary to enable the architect to perform his job. Article 5 defines the "construction cost" of the project and is a necessary provision when the compensation of the architect is based upon the construction cost of the project and/or if provisions are added to the agreement as suggested hereinafter, requiring the architect to develop preliminary and final estimates of the "construction cost" as the project proceeds. Article 6, as its title implies, pertains to the use and ownership of the documents prepared by the architect and essentially states that the architect owns the documents and that the school district has few rights with respect to the documents. Article 7 compels the parties to resort to arbitration under the auspices of the American Arbitration Association should there be a dispute under the contract between the school district and the architect. Article 8 dictates the applicable rules for terminating or suspending the agreement, and Article 9 contains miscellaneous provisions dealing with such subjects as conflict of laws, statutes of limitations, integration, and the like.

Article 10 pertains to payments that will be made to the architect and the time when those payments are due; and Article 11 describes the basis for the architect's compensation. Generally, compensation is based upon either a percentage of the construction cost of the project or a stipulated sum. Finally, Article 12 is blank, providing the parties the space to insert additional provisions into the document.

Section-by-section Analysis AIA Document B141-1987

Language from AIA Document B141-1987 should not be used without careful review and appropriate modification. Following is a section-by-section discussion of those provisions where change or modification is recommended. Following the discussion of each section where changes are proposed will be one or more recommended provisions amending, substitut-

ing, or adding to the AIA standard form of agreement.

Where suggestions are made to modify existing provisions, recommended deletions and additions are clearly indicated. Where provisions of the standard form of agreement are not referenced, no modifications or changes are recommended. If a similar provision is included in the revised B141-1997 the new paragraph number is noted in brackets at the end of the suggested language.

ARTICLE 1: ARCHITECT'S RESPONSIBILITIES

- **Changes in Schedule of Services**

Article 1 of the standard form of agreement serves both as an introduction to the agreement and as a substantive section. It contains a requirement that the architect submit to the owner for approval a schedule for the performance of the architect's services. This provision is weakened, however, by allowing the schedule to be adjusted "as the Project proceeds" without stating how such adjustments are to be made.[5] It is recommended that paragraph 1.1.2 be amended to state that adjustments in the architect's schedule may be made in writing by mutual agreement of the parties.

SUGGESTED SUBSTITUTION:

1.1.2 The Architect's services shall be performed as expeditiously as is consistent with professional skill and care and the orderly progress of the Work. Upon request of the Owner, the Architect shall submit for the Owner's approval a schedule for the performance of the Architect's services which may be adjusted <u>in writing by mutual agreement of the parties</u> as the Project proceeds, and shall include allowances for periods of time required for the Owner's review and for approval of submissions by authorities having jurisdiction over the Project. Time limits established by this schedule approved by the Owner shall not, except for reasonable cause, be exceeded by the Architect or Owner.

[1.2.3.2 in B141-1997]

- **Standard of Care**

An apparent omission in the AIA form is a reasonably clear statement of the standard of performance expected of the architect. Paragraph 1.1.2 implies a standard of ordinary professional skill and care. School districts should add a new paragraph to Article 1 which establishes the highest standards of professional performance by the architect.

SUGGESTED ADDITION:

<u>1.4 The Architect will follow the highest standards of the profession in performing all services under this Agreement.</u>

[not included in B141-1997]

5. The equivalent provision in B141-1997 states that the schedule "shall be adjusted, if necessary, as the Project proceeds. . ." ¶ 1.2.3.2, B141-1997.

ARTICLE 2: SCOPE OF ARCHITECT'S BASIC SERVICES[6]

- **Normal Engineering Services**

Paragraph 2.1.1 defines the scope of the architect's basic services as those stated in the document plus those identified in Article 12, a blank section of the form for adding additional services to the basic services. This paragraph also limits the scope of engineering services provided by the architect to "normal, structural, mechanical and electrical engineering services." Because controversy may arise as to what constitutes "normal" engineering services, it is recommended that the paragraph be amended to require the architect to provide those engineering services necessary to produce a reasonably complete and accurate set of construction documents. If other engineering services are required beyond what the architect considers "normal," they can be specifically listed and priced in Article 12.

SUGGESTED SUBSTITUTION:

2.1.1 The Architect's Basic Services consist of those described in Paragraphs 2.2 through 2.6 and any other services identified in Article 12 as part of Basic Services, and include normal structural, mechanical and electrical engineering services ~~[.]~~ and any other engineering services necessary to produce a reasonably complete and accurate set of Construction Documents, as described in paragraph 2.4, except those engineering services provided by the Owner as set forth in Article 4.6.1.

[2.4.1 in B141-1997]

- **Review and Analysis of Owner's Programming Needs**

Paragraph 2.2.1 begins the description of the architect's duties during the schematic design phase of the project. The paragraph merely requires that the architect "review" the program furnished by the owner to ascertain the requirements of the project. It is suggested that the architect both review and analyze the program. Under the AIA form contract, providing analyses of the owner's needs and programming requirements is an "additional service" triggering additional compensation to the architect. By stating in paragraph 2.2.1 that the architect shall analyze the program, such services will be provided to the school district at no extra cost as part of the "basic services". It is also suggested that the architect be required in paragraph 2.2.1 to commit an understanding of the owner's programming requirements to writing and to submit a copy to the owner for approval before proceeding with drafting preliminary designs.

SUGGESTED SUBSTITUTION:

2.2.1 The Architect shall review and analyze the program furnished by the Owner to ascertain the requirements of the Project, ~~[and]~~ shall arrive at a mutual understanding of such requirements with the Owner, shall commit such understanding to writing, and shall furnish a copy to the Owner for approval before proceeding with preliminary designs.

[not included in B141-1997]

6. In the 1997 version, this article is replaced by a self-contained "Standard Form of Architect's Services," forming the second part of B141-1997.

- **Compliance of Design Documents with Legal Requirements**

Paragraph 2.2.4 fails to state that the design documents shall comply with all applicable laws, statutes, ordinances, codes, rules and regulations. Architects contend that such an omission at this preliminary stage of the design is of no moment because there is plenty of time later in the process to ensure that designs comply with regulatory requirements. However, from the perspective of the school district, there is little reason why compliance with applicable requirements should not be insisted upon even at this stage of the design. Subsequent attempts to bring the project into compliance with law may result in additional or unanticipated expense to the school district.

The idea expressed in paragraph 2.2.4 that the owner gives "approval" to the schematic design documents may lead some to argue that such approval precludes the owner from later asserting a claim against the architect should it be determined that the design was defective or legally deficient.[7] Consequently, it is recommended that language be added to limit the meaning and significance of the owner's approval.

SUGGESTED SUBSTITUTION:

2.2.4 Based on the mutually agreed-upon program, schedule and construction budget requirements, the Architect shall prepare, for approval by the Owner, Schematic Design Documents consisting of drawings and other documents illustrating the scale and relationship of the Project components. The Design Documents shall comply with all applicable laws, statutes, ordinances, codes, orders, rules, and regulations in force as of the date of the development of the documents. Approval by the Owner shall be deemed to be approval of the concept though not the means, techniques or particular material recommended by the Architect.

[2.4.2.1 in B141-1997]

- **Analysis of Energy Costs**

Energy costs and efficiency are important cost considerations. The AIA agreement does not require the architect to provide an analysis of the energy costs associated with the project. To the extent that the school district believes such analysis should be provided by the architect, it is recommended that a paragraph be added.

SUGGESTED ADDITION:
ALTERNATIVE #1

2.3.3 The Architect shall submit to the Owner an analysis of the total estimated energy necessary to operate the Project properly during a normal or average year. This analysis shall include the estimated energy necessary to heat, cool and light the Project and to operate the equipment essential to both the Project and the Program. The total annual estimated energy need shall then be translated into cost

cont'd

7. Paragraph 2.4.2.1 in B141-1997 eliminates owner approval. It also specifies what the Schematic Design Documents shall include and gives the architect discretion to include other elements.

2.3.3 — cont'd
estimates by type of energy based on current cost of each type of energy, i.e., electricity, coal, oil, natural gas, LP gas, etc., for each facility of the Project. The Owner and Architect agree that the actual energy cost and the estimated energy cost may vary due to the Owner's usage of the energy system, weather conditions and increases in energy costs. The Architect shall not be responsible or held legally liable for reasonable variations between the estimated and actual energy costs.

[not included in B141-1997]

SUGGESTED ADDITION:
ALTERNATIVE #2

2.3.3 The design of the Project will provide for energy efficient structures that will produce average monthly costs not to exceed $ ____ per month at present rates at normal room temperatures, normal lighting and other electrical needs.

[not included in B141-1997]

- **Construction Documents**

Paragraph 2.4.1 begins the contractual provisions pertaining to the construction document phase of the agreement. Based upon the approved design development documents and any adjustments in them authorized by the school district, the architect is required to prepare, for the owner's approval, the construction documents.[8] At this point, it is suggested that the school district amend the contract to address the selection and employment of engineering services.

8. ¶ 2.4.4.1 of B141-1997 eliminates owner approval of the construction documents.

It is the duty of the architect to select engineers qualified by training and experience in the respective fields to address the specific requirements of the project. The architect should be required to submit to the school district for approval, not to be unreasonably withheld, a list of the engineers to be employed on the project. Although most owners are not in a position to assess the qualifications of various engineers, a school district may have had a bad experience with an engineering firm which it does not want to repeat. Further, the school district should require the architect to ensure that each engineer places his seal, name and signature on those drawings

SUGGESTED SUBSTITUTION:

2.4.1 Based on the approved Design Development Documents and any further adjustments in the scope or quality of the Project or in the construction budget authorized by the Owner, the Architect shall prepare, for approval by the Owner, Construction Documents consisting of Drawings and Specifications setting forth in detail the requirements for the construction of the Project~~[.]~~, including, but not limited to, the work required for the architectural, structural, mechanical, electrical, plumbing, service-connected equipment, and site work, and the necessary general conditions of the contract. The Architect shall provide the services of professional structural, mechanical, civil, electrical and other engineers, qualified by training and experience in their respective fields, as needed, to

cont'd

2.4.1 — cont'd
address the requirements of the Project; shall submit a list of the names of the engineers to be employed by the Architect to the Owner, in advance, for the Owner's review and approval, which approval shall not be unreasonably withheld, and shall require such professional engineers to place their seal, name and signature on the Drawings and Specifications prepared by them. Said Construction Documents shall comply with all applicable laws, statutes, ordinances, codes, rules and regulations. Approval by the Owner shall not constitute approval of the means, techniques or particular material recommended by the Architect for the Project.

[2.4.4.1 in B141-1997]

and specifications prepared by him. In addition, the architect should warrant that the construction documents will be in accordance with applicable law, standards, and the like.

- **Bidding Information**

Paragraph 2.4.2 states that the architect is simply required to "assist" the owner in the preparation of bidding information and forms. In actual practice, the architect generally is primarily responsible for the preparation of bidding information and bidding forms. The contract should be amended to reflect that the architect bears this responsibility. (For more discussion of bidding issues, see L. Slutzky, *School Construction Bidding Issues*, infra at 147.) Furthermore, where the school district requires a preliminary estimate of the "construction cost," it is recommended that this paragraph be amended to require the architect to provide final estimates of the "construction cost."

SUGGESTED SUBSTITUTION:

2.4.2 The Architect, after consultation with the Owner, shall ~~[assist the Owner in the preparation of]~~ prepare the necessary bidding information, bidding forms, the Conditions of the Contract, a final estimate of the Construction Cost as defined in paragraph 5.1.2.3 of this Agreement, and the form of Agreement between the Owner and Contractor, subject to the review and approval of the Owner's legal counsel.

[2.4.4.2 and 2.1.7.1 in B141-1997]

- **Government Documents**

Paragraph 2.4.4 describes the architect's duty as "assisting" the owner in connection with filing documents required for approval of governmental authorities. Because many school district administrators may not know what documents must be filed, or where to file them, it is suggested that this paragraph be amended to

SUGGESTED SUBSTITUTION:

2.4.4 The Architect shall ~~[assist the Owner in connection with the Owner's responsibility]~~ be responsible, with the assistance of the Owner, for filing documents required for the approval of governmental authorities having jurisdiction over the Project. The Architect shall be responsible for making such changes in the Construction Documents as may be suggested by said governmental authorities at his expense when instructed to do so by the Owner.

[2.1.6 in B141-1997]

require the architect, with the assistance of the school district, to be responsible for filing documents required for approval of various governmental authorities. In some areas, the general contractor, not the owner or architect, customarily files necessary documents and obtains permits and the like. Where appropriate, the contract documents should be modified to reflect the practice. Where reviewing authorities may require or recommend changes, those approved by the owner should be made by the architect with no additional cost to the school district.

- **Operations Manual and Owner Training**

The standard form AIA agreement omits any requirement that the architect ensure that the contractor provide operation manuals and adequate training for the owner in the operation of mechanical, electrical, heating and air conditioning systems installed by the contractor. It is recommended that such an obligation be added.

SUGGESTED ADDITION:

2.4.5 The Architect shall include in the bidding information, plans or specifications, a requirement that the Contractor(s) provide operation manuals and adequate training for the Owner in the operation of mechanical, electrical, heating and air conditioning systems installed by the Contractor(s).

[not included in B141-1997]

- **Modification of Contract Documents to Fit Budget**

A vital addition to the contract, especially where the architect is being compensated on a percentage basis, is a provision stating that if the lowest bid (or bids) exceeds the budget for the project (or exceeds the budget by a certain percentage), or exceeds the final estimates required to be provided (or exceeds the final estimates by a certain percentage), the architect, in consultation with and at the direction of the school district, shall provide such modifications in the contract documents as necessary to

SUGGESTED ADDITION:

2.5.2 In the event the lowest responsible bid (or bids) exceeds either the funds appropriated for the Project or the final estimates provided by the Architect pursuant to paragraph 2.4.2 of this Agreement, the Architect, in consultation with and at the direction of the Owner, shall provide such modification in the Contract Documents as shall be necessary to bring the cost of the Project within the Project's budget as established by the Owner or the Architect's final estimates, as the Owner shall determine.

[not included in B141-1997]

bring the cost of the project within its budget or final estimates. By adding this provision within the architect's basic services, the architect would have to provide these services at no additional charge. Without such a provision, especially where the architect's fee is based upon a percentage of the construction cost, it could be to the architect's advantage to produce a set of plans which increases construction costs. By requiring estimates in conjunction with a provision mandating revisions at no extra cost to the school district where bids exceed the estimates, more accurate estimates are likely to be obtained. Although the

school district's budget and the architect's estimates will often be the same, it is possible that the estimates may be less than the budgeted amounts.

- **Duration of Basic Services**

Several provisions in the AIA standard form of agreement deal with the time during which the architect is required to perform "basic services." Paragraph 11.5.1 of the agreement provides that basic services will be provided for a specific period of time as agreed upon by the parties, usually expressed in the number of months that the parties believe is necessary for the completion of the project. Under that provision, any services performed outside the agreed upon period will be billed as extras even if the nature of the service is such that it would otherwise be considered a basic service. However, paragraph 2.6.1 effectively modifies paragraph 11.5.1 by stating that the construction phase of the contract terminates at the earlier of the issuance of the final certificate of payment or sixty (60) days after the date of substantial completion of the work. Because of the wording of paragraph 2.6.1, the architect's obligation to provide basic services at no additional cost to the school district could possibly expire before the intended term of the agreement as expressed in paragraph 11.5.1. Little if any rationale supports such a provision, thus, paragraph 2.6.1 should be amended to provide that basic services do not terminate until the architect issues the final certificate for payment to the owner or the period set forth in paragraph 11.5.1 expires.[9]

Paragraphs 2.6.2 and 2.6.3 should be changed as follows:[10]

SUGGESTED SUBSTITUTION:

2.6.1 Subject to the time limitations set forth in paragraph 11.5.1, the Architect's responsibility to provide Basic Services for the Construction Phase under this Agreement commences with the awarding of ~~[the]~~ any Contract for Construction and terminates at the ~~[earlier]~~ later of the issuance to the Owner of the final Certificate for Payment ~~[or 60 days after the date of Substantial Completion of the Work]~~ to all Contractors, issuance of a certificate of occupancy, or submission of record drawings, unless extended under the terms of Subparagraph 10.3.3.

[2.6.1.2 in B141-1997]

SUGGESTED SUBSTITUTION:

2.6.2 The Architect shall provide administration of the Contract for Construction as set forth below and in the edition of AIA Document A201, General Conditions of the Contract for Construction, current as of the date of this Agreement, ~~[unless otherwise provided in this Agreement]~~ as may be amended by the Owner.

[2.6.1.1 in B141-1997]

2.6.3 Duties, responsibilities and limitations of authority of the Architect shall not be restricted, modified or extended without written agreement of the Owner and Architect ~~[with consent of the Contractor, which consent shall not be unreasonably withheld]~~ and notice to the Contractor.

[2.6.1.4 in B141-1997]

9. Paragraph 2.6.1.2 in B141-1997 refers only to Contract Administration Services, not Basic Services. It specifically entitles the architect to a Change in Services when Contract Administration Services extend 60 days after the date of substantial completion.

- **Role of the Architect**

As discussed earlier, opinions differ as to the role of the architect and the relationship of the architect to the school district. Paragraph 2.6.4 states that the architect represents the owner; however, the provision seems to indicate that the architect represents the owner only until final payment to the contractor is due and that the architect's role assumes some different and unidentified characteristic after final payment is due to the contractor.[8] The paragraph should be appropriately modified.

SUGGESTED SUBSTITUTION:

2.6.4 The Architect shall be a representative of and shall advise and consult with the Owner. ~~[(1) during construction until final payment to the Contractor is due, and (2) as an Additional Service at the Owner's direction from time to time during the correction period described in the Contract for Construction.]~~ Instructions to the Contractor(s) shall be forwarded through the Architect. The Architect shall have authority to act on behalf of the Owner only to the extent provided in this Agreement unless otherwise modified by written instrument.

[2.6.2.3 in B141-1997]

- **Site Visits**

Paragraph 2.6.5, one of the most important provisions of the agreement, establishes the architect's duty to visit the site at appropriate intervals; to observe or inspect the work of the contractor; and to determine if the work is being performed in accordance with the contract documents.[12] However, the provision is somewhat nebulous and restricts the scope of the architect's duties and legal liability. Significant changes must be made to the paragraph to remove unwarranted ambiguity.

SUGGESTED SUBSTITUTION:

2.6.5 The Architect shall visit the site ~~[at intervals appropriate to the stage of construction or as otherwise agreed by the Owner and Architect in writing to become generally familiar with the progress and quality of the Work completed and to determine in general if the Work is being performed in a manner indicating that the Work when completed will be in accordance with the Contract Documents.]~~ not less than once per week while Work is in progress, and as often as necessary and appropriate to the stage of construction (with particular emphasis on structural work) to inspect the site and Work; to familiarize himself with the progress and quality of the Work; and to determine for the Owner's benefit and protection if the Work is proceeding in accordance with the intent of the Contract Documents and construction schedule. The Architect shall attend all construction progress meetings in conjunction with or in addition to visiting the site in

cont'd

10. Paragraph 2.6.1.1 of B141-1997 states that any modification made to the General Conditions are enforceable only to the extent they are consistent with B141 or have been approved by the architect.

11. Paragraph 2.6.1.3 of B141-1997 makes the architect the owner's representative only during the provision of Contract Administration Services.

12. Paragraph 2.6.2.1 in B141-1997 does note that the architect is acting as the owner's representative when making site visits and is to keep the owner informed of the progress and quality of the work completed.

2.6.5 — cont'd
satisfaction of other responsibilities. The Architect shall use reasonable care to guard the Owner against defects and deficiencies in the Work and the Contractor's failure to carry out the Work in accordance with the Contract Documents and the construction schedule. ~~[However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work.]~~ On the basis of his on-site observations and inspections as an architect, the Architect shall keep the Owner informed of the progress and quality of the Work, and shall ~~[endeavor to guard the Owner against defects and deficiencies in the Work]~~ give prompt notice to the Owner in writing of any major or material deviations from the Contract Documents in the Work. The Architect shall provide services made necessary by major defect or deficiencies in the Work of the Contractor which through reasonable care should have been discovered by the Architect and promptly reported to the Owner and Contractor(s) but which the Architect failed to discover and/or report.

[2.6.2.1 in B141-1997]

The following suggested substitution represents a major revision of paragraph 2.6.5 of the standard form of agreement and some architects may object, preferring the word "observations" to the word "inspections" and maintaining that the contractor rather than the architect has the responsibility to complete the work in accordance

SUGGESTED SUBSTITUTION:

2.6.6 The Architect shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, except to ensure that the Work is in accordance with the Contract Documents all as set forth in paragraph 2.6.5 hereof. ~~[since these are solely the Contractor's responsibility under the Contract for Construction;]~~ Except as provided in this Agreement, the Architect shall not be responsible for the Contractor's schedules or failure to carry out the Work in accordance with the Contract Documents~~[. The Architect]~~ and shall not have control over or charge of acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work.

[2.6.2.2 in B141-1997]

with the contract documents. If the school district desires someone to represent its interests during the construction phase, the following wording is necessary. If these changes are not made, the school district should be certain that adequate supervision and inspection is undertaken at its expense or by its own employees or agents.

- **Responsibility for Contractor's Work**

Paragraph 2.6.6 provides that the architect is not responsible for construction means, methods, techniques, sequences and procedures.[13]

13. Paragraph 2.6.2.2 in B141-1997 requires the architect to report known deviations from the Contract Documents and construction schedule but completely eliminates language relating to the architect's responsibility for the contractor's work. The new paragraph acknowledges the architect's responsibility only for its own negligent acts and omissions but absolves the architect of any responsiblity for the acts or omissions of the contractor or anyone else performing portions of the work.

However, the standard form of agreement goes too far in stating that these functions are solely the responsibility of the contractor, thus necessitating appropriate modifications to tone down the disclaimers of the architect.

- **Consequences of Architect's Breach**

Under the many provisions describing the architect's basic services, the architect has a variety of duties. However, nothing in the agreement sets forth the responsibilities of the architect should the architect breach his obligations. Therefore, the following provision should be added to the standard form of agreement making it clear that the architect will provide additional services at no cost to the school district in order to cure any defects he has caused.

SUGGESTED ADDITION:

2.6.6.1 The Architect shall provide services made necessary by major defects or deficiencies in the work of the Contractor(s) or their agents or employees which through reasonable care the Architect should have discovered and promptly reported to the Owner but failed so to do. In addition, the Architect represents that he will follow the highest standards of the profession in performing all services under this Agreement. Any defective designs or specifications furnished by the Architect shall be promptly corrected by the Architect at no cost to the Owner. The Owner's approval, acceptance, use of or payment for all or any part of the Architect's services hereunder or the Project itself shall in no way diminish or limit the Architect's obligations and liabilities or the Owner's rights.

[not included in B141-1997]

- **Owner's Access to the Work**

Paragraph 2.6.7 of the agreement gives the architect access to the Work. The implied right of access to the Owner should be expressly stated.

SUGGESTED SUBSTITUTION:

2.6.7 Both the Owner and the Architect shall at all times have access to the Work wherever it is in preparation or progress.

[2.6.2.3 in B141-1997]

- **Owner's Communication with Contractor**

Paragraph 2.6.8 requires that the owner and the contractor communicate through the architect.[11] As a general proposition, such a requirement serves many important purposes and should generally be maintained. However, for practical reasons, there may be times

SUGGESTED SUBSTITUTION:

2.6.8 The Owner and Contractor shall communicate through the Architect except (1) as may otherwise be provided in the Contract Documents, ~~[or]~~ (2) when direct communications have been [specially] specifically authorized, ~~[the Owner and Contractor shall communicate through the Architect.]~~ or (3) when such communication has been attempted and could not reasonably be accomplished in a timely manner in consideration of the requirements of the Project.

cont'd

14. Paragraph 2.6.2.4 in B141-1997 requires only that the owner "endeavor" to communicate with the contractor through the architect "about matters arising out of or relating to the Contract Documents."

2.6.8 — cont'd
Where direct communication between Owner and Contractor has occurred, the Owner and Contractor shall promptly and jointly document the nature and result of the communication as well as the reason for the direct communication and shall provide a copy of said documentation to the Architect. Communication by and with the Architect's consultants shall be through the Architect.

[2.6.2.4 in B141-1997]

when the requirement cannot be fulfilled. It is suggested that modifications be made to recognize such contingencies and to define the obligations of the parties when such contingencies occur.

- **Review of Contractor's Application for Payment**

Paragraph 2.6.9 of the standard form of agreement obligates the architect to review the contractor's applications for payment. The provision does not obligate the architect to take into account the contractor's performance when determining the amounts due.[15] The paragraph should be amended to cure this deficiency.

- **Certification for Payment**

Paragraph 2.6.10 describes the architect's duties with respect to the issuance of certificates for payment. Consistent with the amendments suggested with respect to paragraph 2.6.9, the architect's certification should

15. Paragraph 2.6.3.1 in B141-1997 requires that the architect's review and certification be based only on the architect's evaluation of the work.

SUGGESTED SUBSTITUTION:

2.6.9 Based on the Architect's observations, inspections of the Work, and evaluations of the Contractor's Applications for Payment, the Architect shall review and certify the amounts due the Contractor. Said review and certification shall be completed within ____ days of the Architect's receipt of the Application.

[2.6.3.1 in B141-1997]

SUGGESTED SUBSTITUTION:

2.6.10 The Architect's certification for payment shall constitute a representation to the Owner, based on the Architect's inspections and observations at the site as provided in Subparagraph 2.6.5 and on the data comprising the Contractor's Application for Payment, that the Work has progressed to the point indicated, ~~[and]~~ that ~~[,to the best of the Architect's knowledge, information and belief,]~~ the quality of the Work is in accordance with the Contract Documents and that the Work has been performed in a good and workmanlike fashion. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to minor deviations from the Contract Documents correctable prior to completion and to specific qualifications expressed by the Architect. The issuance of a Certificate for Payment shall further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment shall not be a representation that the

cont'd

2.6.10 — cont'd
Architect has ~~[(1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2)]~~ reviewed construction means, methods, techniques, sequences or procedures ~~[,(3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment]~~ or ~~[(4)]~~ ascertained how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

[2.6.3.1 and 2.6.3.2 in B141-1997]

be based on his inspections as well as his observations of the work site. The provision should more clearly state that the architect's certificate should be based on the architect's actual knowledge of the quality of the work.

- **Rejection of Contractor's Work**

Paragraph 2.6.11 of the standard form of agreement provides that the architect has the "authority" to reject work by the contractor that does not conform to the contract documents. The provision should be strengthened to require the architect to reject such work unless the work is acceptable to the school district.

SUGGESTED SUBSTITUTION:

2.6.11 Where Work does not conform to the Contract Documents, the Architect shall ~~[have authority to]~~ promptly notify the Owner of the Architect's intent to reject such Work and shall reject nonconforming Work unless the Owner stops the Architect in writing within twenty-four (24) hours of being notified. ~~[which does not conform to the Contract Documents.]~~ Whenever the Architect considers it necessary or advisable for implementation of the intent of the Contract Documents, the Architect will have authority to require additional inspection or testing of the Work in accordance with the provisions of the Contract Documents, whether or not such Work is fabricated, installed or completed. Where such additional inspection and testing is to be at additional cost to the Owner, such additional inspection and testing is to be required by the Architect only upon advance notice and approval by the Owner. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees or other persons performing portions of the Work.

[2.6.2.5 in B141-1997]

- **Review of Contractor Submittals**

The architect's duty to review and approve the contractor's submittals such as shop drawings is described in paragraph 2.6.12. The exculpatory language contained in that paragraph should be deleted. The purpose of the architect's review and approval would then be clearly stated "for the purpose of checking conformity with the contract documents and applicable laws, statutes, ordinances, codes, rules and regulations."

SUGGESTED SUBSTITUTION:

2.6.12 The Architect shall review and approve or take other appropriate action upon Contractor's submittals such as Shop Drawings, Product Data and Samples ~~[,but only]~~ for the ~~[limited]~~ purpose of checking for conformance with ~~[information given and the design concept expressed in]~~ the Contract Documents and all applicable laws, statutes, ordinances, codes, rules and regulations. The Architect's action shall be taken with such reasonable promptness as to cause no delay in the Work or in the construction of the Owner or of separate contractors, while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities or for substantiating instructions for installation or performance of equipment or systems designed by the Contractor, all of which remain the responsibility of the Contractor to the extent required by the Contract Documents. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component. When professional certification of performance characteristics of materials, systems or equipment is required by the Contract Documents, the Architect shall be entitled to rely upon such certification to establish that the materials, systems or equipment will meet the performance criteria required by the Contract Documents.

[2.6.4.1 and 2.6.4.3 in B141-1997]

- **Architect's Authority over Owner's Performance**

Paragraphs 2.6.15 and 2.6.16 represent additional provisions that reflect the confusing description of the role of the architect in the

SUGGESTED SUBSTITUTION:

2.6.15 The Architect shall interpret and decide matters concerning performance of the ~~[Owner and]~~ Contractor under the requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests shall be made with reasonable promptness and within any time limits agreed upon.

[2.6.1.7 in B141-1997]

2.6.16 Interpretations and decisions of the Architect shall be consistent with the intent of and reasonably inferable from the Contract Documents and shall be in writing or in the form of drawings. When making such interpretations and initial decisions, the Architect shall endeavor to secure faithful performance by [both Owner and] the Contractor ~~[, shall not show partiality to either,]~~ and shall not be liable for results of interpretations or decisions so rendered in good faith and without negligence.

[2.6.1.8 in B141-1997]

standard form of agreement. These paragraphs purport to give the architect the authority to "decide" matters concerning the performance of the school district as well as the performance of the contractor and to prohibit the architect from showing partiality to the school district. These provisions conflict with the notion that the architect represents the school district and should make decisions for the district's benefit.

- **Aesthetic Effect**

Paragraph 2.6.17 makes the architect the final authority with respect to aesthetic effect. If the school district desires to maintain final authority, this paragraph must be amended.

SUGGESTED SUBSTITUTION:

2.6.17 ~~[The Architect's decisions on matters]~~ The Owner shall have final authority on questions relating to aesthetic effect, ~~[shall be final if]~~ provided such authority is exercised in a way which is consistent with the intent expressed in the Contract Documents.

[2.6.1.9 in B141-1997]

- **Arbitration**

Paragraph 2.6.19 concerns arbitration of disputes. If the school district prefers not to refer disputes to arbitration, this provision should be deleted. (For more discussion of arbitration, see Article 7, *infra* at 73.)

- **Other Basic Services**

Before leaving Article 2, the school district should consider whether to identify additional items as basic services. Obviously, the more services placed in Article 2 as part of the basic services, the higher the architect's basic fee. With that caveat, a school district should consider adding the following provisions to the list of basic services.[16]

SUGGESTED ADDITIONS:

2.6.20 The Architect shall provide services to investigate existing conditions or facilities or to make measured drawings thereof, or to verify the accuracy of drawings or other information furnished by the Owner.

2.6.21 The Architect shall provide coordination of construction performed by separate Contractors or by the Owner's own forces and coordination of services in connection with construction performed and equipment supplied by the Owner, including establishing and conducting a regular schedule of monthly meetings between Contractors and the Owner. Such monthly meeting shall be held throughout the entire Construction Phase of the Project and shall be for the primary purpose of assessing the progress of the Work of each Contractor and recommending to the Owner such remedial actions as are necessary to ensure required progress and completion in accordance with the construction schedule and within contract time. The Architect shall submit to the Owner and to the Contractors a full report of each such meeting as soon after the meeting as is practical.

16. Some of these services are listed in Paragraph 2.8.3 in B141-1997. That agreement indicates the architect will provide them only if specifically designated.

2.6.22 The Architect shall be prepared to serve and shall serve when requested by the Owner as a witness in connection with any public hearing, arbitration proceeding, legal proceeding or administrative law proceeding to which the Owner or the Architect is a party concerning the Project as part of his Basic Services.

2.6.23 The Architect shall prepare or provide a set of reproducible record drawings showing significant changes in the Work made during construction based on marked-up prints, drawings and other data furnished by the Contractor(s) to the Architect including, but not limited to, the location of water, sewer, telephone, electric, gas and any other utility lines. Both the Architect and Contractor shall certify these drawings as accurate.

2.6.24 The Architect shall Provide services in connection with evaluating substitutions proposed by the Contractor and making subsequent revisions to Drawings, Specifications and other documentation resulting therefrom.

2.6.25 The Architect shall Provide services in evaluating claims submitted by the Contractor or others in connection with the Work.

2.6.26 The Architect shall Provide analysis of the Owner's needs and programming the requirements of the Project.

cont'd

2.6.27 The Architect shall Provide detailed estimates of Construction Cost.

[Compare Article 2.8 in B141-1997]

ARTICLE 3: ADDITIONAL SERVICES

Article 3 of the B141-1987 divides additional services into three categories:

- Representation beyond basic services;
- Contingent additional services; and
- Optional additional services.[17]

The listing of project representation as an additional service raises a legitimate question of how much on-site representation is actually provided or required without the purchase of these additional services. However, it does provide a reasonable alternative to the employment of a construction manager for those owners who desire that a representative of the owner be on the site on a daily basis, a situation which is not normally necessary. Generally, contingent additional services are made necessary or desirable by an unforeseen event or some change in circumstances arising after the formation and execution of the agreement. Optional additional services, as the name implies, are purely optional.

17. Article 2.8 and Paragraph 1.3.3 of B141-1997 do not adopt this division of additional services explicitly. However, Paragraph 2.8.1 allows the parties to specify a certain number of site visits and inspections and reviews of contractor submittals as part of Design or Contract Administration Services. Any such services beyond the specified limits are considered a Change in Service. Paragraph 2.8.2 provides that certain Contract Administration Services resulting from circumstances beyond the architect's control are considered Changes in Service. Paragraph 2.8.3 states that the architect is obliged to provide certain other enumerated services only if specifically designated.

- **Process for Contingent Services**

Paragraph 3.1.1 establishes a procedure which simply requires the architect to notify the owner prior to commencing a contingent additional service.[18] The owner must then notify the architect in writing if the owner does not want the architect to provide the service. No time period is specified in the agreement for this notice and response. Although the procedure may be acceptable, it is suggested that the school district require written notification from the architect advising the school district of the need for the service prior to its commencement. Furthermore, additional services that become necessary only through the fault or negligence of the architect should be performed at no additional cost. This notion should be expressly set forth in the contract.

SUGGESTED SUBSTITUTION:

3.1.1 The services described in this Article 3 are not included in Basic Services unless so identified elsewhere in this Agreement as being included in Basic Services ~~[in Article 12]~~, and they shall be paid for by the Owner as provided in this Agreement, in addition to the compensation for Basic Services. The services described under Paragraphs 3.2 and 3.4 shall only be provided if authorized ~~[or confirmed]~~ in advance in writing by the Owner. If, in the opinion of the Architect, services described under Contingent Additional Services in Paragraph 3.3 are required due to circumstances beyond the Architect's control, the Architect shall ~~[notify]~~ advise the Owner of the need for those services in writing prior to commencing such services. If the Owner deems that such services described under Paragraph 3.3 are not required, the Owner shall give prompt written notice to the Architect. If the Owner indicates in writing that all or part of such Contingent Additional Services are not required, the Architect shall have no obligation to provide those services. If, however, services described under Paragraph 3.3 are required due to circumstances within the control of the Architect, such services shall be provided as a part of Basic Services. Notwithstanding any provision to the contrary, no compensation shall be paid to the Architect for additional services that became necessary as a result of the fault or negligence of the Architect or his agents or employees.

[1.3.3.1 in B141-1997]

- **Protection of Owner Against Defects**

Paragraph 3.2.3 provides that the project representative shall "endeavor" to provide certain protections for the owner. It is suggested that the agreement should be modified to require the project representative to provide those protections.

18. Paragraph 1.3.3.1 of B141-1997 requires that Changes in Service be mutually agreed in writing or that the architect notify the owner prior to providing the service. It also recognizes that the architect is not entitled to an adjustment in compensation if the Change in Service is due to the architect's fault.

SUGGESTED SUBSTITUTION:

3.2.3 Through the observations by such Project Representatives, the Architect shall ~~[endeavor to]~~ provide further protection for the Owner against defects and deficiencies in the Work, but the furnishing of such project representation shall not modify the rights, responsibilities or obligations of the Architect as described elsewhere in this Agreement.

[not included in B141-1997]

- **Revisions in Drawing Specifications or Other Documents**

Paragraph 3.3.1 of the standard form of agreement makes it a contingent additional service whenever the architect must make revisions in drawings, specifications and other contract documents. However, minor changes in the drawings and specifications of a project are more the norm than the exception. To protect the school district from excessive claims for additional fees under the provisions of this paragraph, the school district should consider inserting the word "material" in front of the word "revisions" in the first line of the paragraph.[19]

SUGGESTED SUBSTITUTION:

3.3.1 Making material and substantial revisions in Drawings, Specifications or other documents when such revisions are:

.1 inconsistent with approvals or instructions previously given by the Owner, including revisions made necessary by adjustments in the Owner's program or Project budget;

.2 required by the enactment or revision of codes, laws or regulations subsequent to the preparation of such documents; or

.3 due to changes required as a result of the Owner's failure to render decisions in a timely manner.

[1.3.3.2 in B141-1997]

- **Services Due to Significant Changes in the Project**

Under paragraph 3.3.2, the architect is entitled to an additional contingent fee for services required because of significant changes in the project. Paragraph 3.3.3 requires additional compensation for contingent additional services needed as a result of change orders and construction change directives. These paragraphs could permit "double dipping" where the architect's fee for basic services is based on a percentage of the construction cost and the change in the project or change orders result in a significant increase in the construction cost, and therefore the architect's fee for basic services. By the same token, if the significant change in the project renders substantial prior work of the architect worthless, it is not as clear that there is "double dipping" even when the construction cost rises from the change. Consequently, the standard form of agreement should be modified to prevent "double dipping," but to allow reasonable compensation for professional services rendered by the architect.

19. Paragraph 1.3.3.2 in B141-1997 does not refer to revisions in drawings, specifications or other documents but instead provides for an adjustment in the architect's schedule and compensation where any of the listed circumstances "affect the Architect's services for the Project."

SUGGESTED SUBSTITUTION:

3.3.2 Providing services required because of significant changes in the Project including, but not limited to, size, quality, complexity, the Owner's schedule, or the method of bidding or negotiating and contracting for construction, except for services required under subparagraph 5.2.5; provided, however, that where said services are made necessary because of the significant increase in the size, quality, or complexity of the Project which results in a significant increase in the Construction Cost and, therefore, the Architect's fee for Basic Services, which fee is commensurate with the services required of the Architect, this provision shall not apply.

[1.3.3.2 in B141-1997]

3.3.3 Preparing Drawings, Specifications and other documentation and supporting data, ~~[evaluating Contractor's proposals,]~~ and providing other services in connection with Change Orders and Construction Change Directives when the adjustment in the basic compensation resulting from the adjusted Construction Cost is not commensurate with the services required of the Architect.

[2.8.2.3 in B141-1997]

- **Certain Services Should Be Basic**

Several paragraphs in Article 3 of the standard form of agreement arguably should be removed from Article 3 and placed in Article 2. Among those provisions are paragraphs 3.3.4 (substitutions proposed by the contractor); 3.3.7 (claims made by contractor and others); 3.4.1 (evaluation of needs of project); 3.4.6 (investigating existing conditions); 3.4.7 (verifying drawings); 3.4.8 (coordinating construction); 3.4.10 (detailed estimates) and 3.4.16 (changed drawings).[20]

3.3.8 should be amended to provide that the architect will attend public meetings or hearings as part of the basic services.

SUGGESTED SUBSTITUTION:

3.3.8 Providing services in connection with ~~[a public hearing,]~~ an arbitration proceeding or legal proceeding except where the Owner or Architect is a party thereto.

[1.3.3.2.6 in B141-1997]

- **Duration of Basic Services**

Paragraph 3.4.18 needs to be amended to be consistent with paragraph 2.6.1 relating to the point in time when basic services end and additional services begin, i.e., after the issuance of the final certificate for payment, except as provided in section 11.5.1.

SUGGESTED SUBSTITUTION:

3.4.18 Providing services after the issuance to the Owner by the Architect of the final Certificate for Payment, ~~[or in the absence of a final Certificate for Payment, more than 60 days after the date of Substantial Completion of the Work]~~ except as provided by subparagraph 11.5.1.

[2.8.2.8 and 2.8.3.21 in B141-1997]

20. These services are listed in B141-1997 in Paragraph 2.8.2 as a Change in Service for which the architect would receive additional compensation or in Paragraph 2.8.3 as services to be provided only if specifically designated.

ARTICLE 4: OWNER'S RESPONSIBILITIES

Succinctly stated, under the standard form of agreement, the owner is responsible for providing information about the project to the architect, establishing a budget for the project, appointing a representative authorized to act for him, furnishing surveys and property descriptions, furnishing geotechnical engineering services to conduct soil tests, paying for various structural, mechanical, chemical, air and water pollution tests, and furnishing legal, accounting and insurance services.

- **Providing Information**

More specifically, paragraph 4.1 requires the owner to provide "full information" regarding the requirements for the project to the architect. Some feel that this provision exaggerates the owner's responsibilities. Depending upon the capacity of the owner's staff to comply with paragraph 4.1 and in consideration of liability issues, the owner may leave it as written or may wish to amend the paragraph to state that the owner shall "consult with the architect".

SUGGESTED SUBSTITUTION:

4.1 The Owner shall ~~[provide full information regarding]~~ with the Architect's assistance identify requirements for the Project, including a program which shall set forth the Owner's objectives, schedule, constraints and criteria, including space requirements and relationships, flexibility, expandability, special equipment, systems and site requirements.

[1.2.2.1 and 2.2.1.1 in B141-1997]

- **Tests and Inspections**

Paragraph 4.7 of the standard form of agreement requires the owner to provide tests for hazardous materials.[21] Such a provision would be inconsistent with the purpose of the agreement if the architect is being specifically retained to inspect or test for hazardous materials such as asbestos. In that event, the paragraph should be deleted or amended to reflect the purpose of the contract.

- **Notice of Defect**

Paragraph 4.10 requires the owner to give the architect prompt written notice if the owner becomes aware of any defect in the project.[22] This duty should be qualified by stating that the owner's failure to so notify the architect does not relieve the architect of any of his duties under the contract.

SUGGESTED SUBSTITUTION:

4.10 Prompt written notice shall be given by the Owner to the Architect if the Owner becomes aware of any fault or defect in the Project or nonconformance with the Contract Documents, but the Owner's failure or omission to do so shall not relieve the Architect of his responsibilities hereunder and the Owner shall have no duty of observation, inspection or investigation.

[1.2.2.7 in B141-1997]

21. Paragraph 1.2.2.5 in B141-1997.

22. Paragraph 1.2.2.7 specifically includes errors, omissions or inconsistencies in the architect's Instruments of Service as a defect of which the owner must promptly notify the architect.

ARTICLE 5: CONSTRUCTION COST

Article 5 of the standard form of agreement defines the phrase "Construction Cost".[23] It is relevant only if the architect's fee for basic services is based on the construction cost of the project or if the architect is required to provide preliminary and final estimates of the construction cost as defined in Article 5. In the absence of either of these features, Article 5 should be deleted in its entirety from the form. If the architect's fee is based on the construction cost, Article 5 should be retained, but amended. Specifically, because the project might be terminated at any point, the phrase "construction cost" should be defined during each phase of the project.

SUGGESTED ADDITION:
ALTERNATIVE #1

5.1.2.1 During the Schematic Design, Design Development and Construction Document Phases, Construction Cost shall be determined by the Owner's budget for the Project.

5.1.2.2 During the Bidding and Negotiation Phase, Construction Cost shall be determined by the lowest responsible bid or bids.

5.1.2.3 During the Construction Phase, Construction Cost shall be determined by the Contract Sum as stated in the Owner-Contractor Agreement, as amended by any Change Orders formally approved by the Owner and Contractor.

cont'd

ALTERNATIVE #2

5.1.2.1 Prior to the Construction Phase, Construction Cost shall be the Architect's Estimated Cost. During Construction Phase, Construction Cost shall be determined by the Contract Sum as stated in the Owner-Contractor Agreement, as amended by any Change Orders formally approved by the Owner and Contractor.

ARTICLE 6: USE OF ARCHITECT'S DRAWINGS, SPECIFICATIONS AND OTHER DOCUMENTS

This article is intended to establish the architect's ownership and complete authority to control and to limit the future use of the documents he develops for a project.[24] Architects appear to have two principal reasons for claiming ownership of these documents, one economic and one legal. Economically, architects want to ensure that owners employ their services each time the owner constructs a new project rather than simply re-using the same set of plans for another project. Legally, architects fear the potential legal liability which might result from an owner using an old set of plans for a new project. To a certain extent, both reasons are valid.

23. Paragraph 1.3.1 in B141-1997 defines "Cost of the Work." Paragraph 2.1.7 in B141-1997 corresponds to language on responsibility for construction costs described in Paragraph 5.2 of B141-1987.

24. Paragraph 1.3.2 in B141-1997 grants owners a limited nonexclusive license to reproduce the architect's "Instruments of Service." The license is nontransferable, but the owner is allowed to authorize contractors to reproduce applicable portions of the documents for use in execution of their work. The provision makes any unauthorized use of the Instruments of Service at an owner's sole risk.

SUGGESTED SUBSTITUTION:
ALTERNATIVE #1

6.1 The Drawings, Specifications and other documents prepared by the Architect for this Project are instruments of the Architect's service for use solely with respect to this Project and, unless otherwise provided, the Architect shall be deemed the author of these documents and shall retain all common law, statutory and other reserved rights, including copyright~~[,]~~; provided, however, that the Owner shall be permitted to retain and make copies, including reproducible copies, of the Architect's Drawings, Specifications and other documents for information, ~~[and]~~ reference and use, in connection with the Owner's use and occupancy of the Project; ~~[The Architect's Drawings, Specifications or other documents shall not be used by the Owner or others on other projects,]~~ for additions to the Project; or for completion of the Project by others ~~[,unless the Architect is adjudged to be in default under this Agreement, except by agreement in writing and with appropriate compensation to the Architect]~~.

[1.3.2 in B141-1997]

ALTERNATIVE #2

6.1 The Drawings, Specifications and other documents prepared by the Architect for this Project are the property of the Owner who shall be vested with all common law, statutory and other reserved rights; provided, however, that the Owner will indemnify and hold the Architect harmless in the event the Owner uses such documents for purposes other than this Project.

[1.3.2 in B141-1997]

Owners, on the other hand, often feel that they have purchased the architect's plans, and therefore, have obtained all incidents of ownership relative to them. These differing perceptions need to be resolved in some way in order to meet the legitimate interests of each party.

The parties should work out a compromise. The following suggestions illustrate two different approaches. The first alternative permits the architect to retain ownership, but gives the school district the right to retain and use the documents for its legitimate needs. The second alternative vests ownership in the school district, but protects the architect from liability should claims be made against the architect as a result of the school district's use of the documents in a manner unrelated to the project. If the second approach is used, the original language of paragraph 6.1 would be deleted entirely.

ARTICLE 7: ARBITRATION

Most attorneys representing owners recommend deleting the arbitration article from the agreement.[25] Although such advice is sound, arbitration offers some advantages in the resolution of some disputes that may arise between a school district and its architect. Therefore, school districts may wish to consider whether to permit voluntary, as opposed to mandatory, arbitration or whether to compel arbitration of only certain defined disputes, such as those where the claims total less than $250,000. Alternatively, mandatory arbitration may be considered to be appropriate

25. Paragraph 1.3.4 of B141-1997 requires the parties to attempt mediation of their disputes as a condition precedent to arbitration or other legal proceedings.

only with respect to small projects, i.e., those under a specified dollar amount, such as $250,000. Where the parties do agree to arbitration, they should provide for limited discovery, such as discovery under the Federal Rules of Civil Procedure for a period of sixty (60) days from the date of filing the claim in arbitration. The limitation on the number of days prevents an architect with a deep pocket from keeping a school district in arbitration for an indefinite period of time.

Where arbitration is permitted or required, the agreement should contain provisions addressing the issue of joinder of necessary parties. The standard form of agreement does not permit the joinder of necessary parties to the dispute, such as the contractor or subcontractors. Similarly, the General Conditions of the Owner-Contractor Agreement do not permit joinder of all parties who may be appropriate. Unless joinder is permitted or required, school districts will be confronted with the possibility of multiple arbitration proceedings and inconsistent decisions. Therefore, if arbitration is permitted or required, a provision allowing or requiring joinder should be included in the contract and should be required in all the contracts associated with the project. Where arbitration is not permitted, provisions as to joinder are unnecessary.

SUGGESTED SUBSTITUTION:
ALTERNATIVE #1

7.1 Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof ~~[shall]~~ may be subject to and decided by arbitration ~~[in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise]~~ if and as agreed to by the parties as evidenced by written consent to such arbitration. If the parties agree to submit any dispute to arbitration, each shall have the right to discovery pursuant to the Federal Rules of Civil Procedure for a period of sixty (60) days from the date of filing the claim in arbitration.

[1.3.5.2 in B141-1997]

Where the foregoing alternative is used, paragraphs 7.2, 7.3 and 7.4 of the standard form agreement should be deleted in their entirety.

[1.3.5.2 - 1.3.5.5 in B141-1997]

ALTERNATIVE #2

7.1 Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof where the amount in controversy has a value less than $250,000 shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Association Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise. Where the parties proceed to arbitration under this provision, the arbitrator(s) shall have no authority to make any award in excess of $250,000 unless the parties mutually agree otherwise in writing. With respect to any dispute properly submitted to arbitration under this provision, the parties may invoke pretrial discovery pursuant to the Federal Rules of Civil Procedure for a period of sixty (60) days from the date of filing the claim in arbitration.

[1.3.5.2 in B141-1997]

SUGGESTED ADDITION:

7.5 This agreement to arbitrate shall include the obligation to include as part of any arbitration proceedings, by joinder or consolidation, all persons or entities not a party to this Agreement to the extent necessary for resolution of the matter in controversy. All contracts relating to this Project shall include this provision as part of any agreement to arbitrate. The foregoing agreement to arbitrate, including the obligation to arbitrate with an additional person or entity by joinder or consolidation shall be specifically enforceable in accordance with applicable law in any court having jurisdiction. Joinder or consolidation of necessary or interested parties shall be a condition precedent to the obligation to arbitrate.

[not included in B141-1997]

ARTICLE 8: TERMINATION, SUSPENSION OR ABANDONMENT

- **Termination**

Paragraph 8.1 of the standard form of agreement authorizes either party to terminate the agreement for cause, provided seven days written notice is given to the other party. The agreement does not specifically require that the cause or reason for the termination be stated in writing. It should be required that the notice state the reason for the termination of the agreement.

SUGGESTED SUBSTITUTION:

8.1 This Agreement may be terminated by either party upon not less than seven days written notice should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination. Should either party exercise his right of termination, the written notice shall set forth the nature of the other party's breach.

[1.3.8.4 in B141-1997]

- **Suspension**

Paragraph 8.2 of the agreement allows the architect to exercise certain rights to compensation should the project be suspended by the school district for more than 30 days. Since a 30 day suspension of a project is too short a period of time to warrant an adjustment in the architect's compensation, the parties should increase the time to at least 60 days and preferably 90 days.

SUGGESTED SUBSTITUTION:

8.2 If the Project is suspended by the Owner for more than ~~[30]~~ ninety (90) consecutive days, the Architect shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the Architect's compensation shall be equitably adjusted to provide for expenses incurred in the interruption and resumption of the Architect's services.

[1.3.8.2 in B141-1997]

- **Abandonment**

Paragraph 8.3 of the standard form of agreement allows the school district to terminate the agreement if the school district permanently abandons the project.[26] Where the agreement is terminated by the school district under conditions of abandonment of the project, the architect is entitled to be reimbursed for certain expenses and "Termination Expenses" that are in addition to the compensation earned by the architect. Termination expenses are a form of liquidated damages. Based upon the economic impact of termination of the contract upon the architect, such termination expenses are not unreasonable.

In addition to allowing school districts to terminate the agreement with the architect upon permanent abandonment of the project, it is recommended that the agreement be amended to allow the school district to terminate the agreement without cause even if the project is not abandoned, with the understanding that the school district would pay the termination expenses. There are several reasons for this. First, if the relationship between school district and architect sours, such a provision would allow the school district to substitute architects. Second, there may be a legitimate dispute as to whether the architect has breached the agreement; if the school district were to attempt to terminate the agreement for cause, it might face uninvited litigation and the possibility of a large compensatory damage award to the architect. Simply terminating the agreement without cause and paying the termination expenses may provide a better alternative. Finally, by permitting the termination of the agreement only for cause, the agreement may be interpreted by the courts as creating a property right in the architect which cannot be abrogated without due process. With such a possibility, school districts would have to proceed very cautiously if there were a need to terminate the agreement for cause in order to ensure that the architect's due process rights were not violated. By amending the standard form of agreement to permit termination of the agreement without cause, school districts would effectively eliminate any argument that the agreement created a property right in the architect.

SUGGESTED SUBSTITUTION:
ALTERNATIVE #1

8.3 This Agreement may be terminated for any reason by the Owner upon not less than seven calendar days' written notice to the Architect ~~[in the event that the Project is permanently abandoned.]~~ If the Project is abandoned by the Owner for more than 90 consecutive days, the Architect may terminate this Agreement by giving written notice.

[1.3.8.3 in B141-1997]

ALTERNATIVE #2

With this alternative, paragraph 8.3 should remain as is and a new paragraph should be added at 8.8.

8.8 The Owner may terminate this Agreement at any time upon

cont'd

26. Paragraph 1.3.8.3 of B141-1997 allows the architect to terminate the agreement where the project or the architect services have been suspended for more than 90 days. It no longer grants the owner such authority. However, paragraph 1.3.8.5 permits the owner to terminate the agreement for the owner's convenience and without cause upon seven days written notice. In the event of termination not the fault of the architect, paragraphs 1.3.8.6 and 1.3.8.7 require the owner to pay the architect for services performed, reimbursable, expenses and certain termination expenses, including the architect's anticipated profit on services not performed.

8.8 — cont'd
seven (7) days written notice to the Architect without cause. In such an event, paragraph 8.7 shall apply. Where the Agreement is terminated by the Owner for cause and said cause is outlined in the written notice of termination as required in paragraph 8.1, paragraph 8.7 shall not apply and the Architect may be held liable for those actual damages suffered by the Owner due to the Architect's failure to perform as provided in this Agreement.

[1.3.8.5 in B141-1997]

- **Termination Expenses**

Paragraph 8.7 defines the "Termination Expenses" to which the architect is entitled in the event of a termination of the agreement for reasons not the fault of the architect. Tantamount to a liquidated damages clause, it requires that the owner pay additional compensation to the architect. Some critics who believe the "Termination Expenses" are somewhat arbitrary and likely to be too high suggest that no additional fees are justified and that the architect is entitled only to all fees earned to date of termination (including corresponding profits) together with substantiated reimbursable costs and expenses. If such approach is taken, paragraph 8.7 should be deleted and paragraph 8.6 should be amended to delete reference to termination expenses.

SUGGESTED SUBSTITUTION:

8.6 In the event of termination not the fault of the Architect, the Architect shall be compensated for services performed prior to termination, together with Reimbursable Expenses then due ~~[and all Termination Expenses as defined in Paragraph 8.7]~~.

[1.3.8.6 in B141-1997]

- **Architect's Obligation After Termination**

The standard form of agreement contains no provision setting forth the obligation of the architect in the event the agreement is terminated by the school district. A provision should be added making it clear that upon termination, the architect is to take no further action except as directed by the school district or as necessary to preserve the work.

SUGGESTED ADDITION:

8.9 Upon termination of this Agreement, the Architect shall perform no further services except as requested in writing by the Owner or as may be necessary to preserve the Work.

[not included in B141-1997]

ARTICLE 9: MISCELLANEOUS PROVISIONS

- **Governing Law**

Paragraph 9.1 states that the agreement will be governed by the law of the principal place of business of the architect. The provision should

be changed to state that the law of the site of the project governs.

SUGGESTED SUBSTITUTION:

9.1 ~~[Unless otherwise provided,]~~ This Agreement shall be governed by the law of ~~[the principal place of business of the Architect]~~ _____.

[1.3.7.1 in B141-1997]

- **Commencement of Actions**

Paragraph 9.3 of the standard form agreement provides that causes of action shall commence at certain times.[27] Generally, it is the intent of the AIA to accelerate the time within which litigation must be commenced against the architect. It is recommended that the paragraph be deleted. First, it may limit the right of the school district to proceed against the architect for latent defects. Second, it may violate the law of some states that generally provides that a statute of limitations cannot run against a municipality.

- **Environmental Hazards**

The heightened awareness of the presence and problems of environmental hazards is reflected in paragraph 9.8. (For more discussion of environmental concerns, see F. Wagner and C. Griffith, *Investigation and Evaluation : Keys to Selecting Safe Sites for School Construction, supra*, at 1.) Paragraph 9.8 provides that the architect and his consultant shall have no responsibility for the discovery, presence, handling, removal or disposal of hazardous materials such as asbestos and other toxic materials. There is no need for such a provision in general. More specifically, the provision would be inconsistent if the architect were being retained for the specific purpose of assisting the school district in remedying its asbestos problems. The paragraph should be replaced with the following:

SUGGESTED SUBSTITUTION:

9.8 ~~[Unless otherwise provided in this Agreement, the Architect and Architect's consultants shall have no responsibility for the discovery, presence, handling, removal or disposal of or exposure of persons to hazardous materials in any form at the Project site, including but not limited to asbestos, asbestos products, polychlorinated biphenyl (PCB) or other toxic substances.]~~ The Architect shall not specify or approve for use in the Project any new materials containing asbestos, asbestos products, polychlorinated biphenyl (PCB) or other toxic substances. If the Architect discovers that such substances as described herein have been used or do exist in the Project, the Architect shall promptly notify the Owner in writing. When asbestos containing materials, polychlorinated biphenyl (PCB) or other toxic or hazardous substances are suspected or found in the course of the Project, the Owner shall immediately provide the services of an appropriately qualified expert or consultant to determine the proper course of action.

[1.3.7.6 in B141-1997]

27. Paragraph 1.3.7.3 in B141-1997.

ARTICLE 10: PAYMENTS TO THE ARCHITECT

- **Reimbursable Expenses**

Paragraph 10.2 of the agreement defines the reimbursable expenses required to be paid by the school district in addition to the compensation that is due the architect.[28] Although always subject to negotiation, it is suggested that paragraph 10.2 be amended to exclude from reimbursable expenses the following:

- ➢ Expenses of transportation in connection with the project;
- ➢ Expenses of long distance telephone communications;
- ➢ Cost of a certain number of reproductions of the drawings, specifications and other documents produced as part of the basic services;
- ➢ Cost of the mandatory insurances that the school district should properly insist upon; and
- ➢ Expenses of computer-aided design and drafting equipment.

SUGGESTED SUBSTITUTION:

10.2.1 Reimbursable Expenses are in addition to compensation for Basic and Additional Services ~~[and include expenses incurred by the Architect and Architect's employees and consultants in the interest of the Project,]~~ and shall be payable provided they are approved in advance and in writing by the Owner. Reimbursable Expenses include actual expenses incurred by the Architect and Architect's employees and consultants in the interest of the Project, as identified in the following Clauses.

10.2.1.1 ~~[Expense of transportation in connection with the Project; expenses in connection with authorized out-of-town travel; long distance communications; and]~~ Fees paid for securing approval of authorities having jurisdiction over the Project.

10.2.1.2 Expenses of reproductions, postage and handling of Drawings, Specifications and other documents, excluding reproductions for the office use of (1) the Architect, (2) the Architect's consultants, (3) the Owner and (4) to provide up to twenty complete sets of Drawings and Specifications without cost for Contractors.

[1.3.9.2 in B141-1997]

28. Paragraph 1.3.9.2 in B141-1997 adds two items to the list of reimbursable expenses—expenses specifically listed as such in paragraph 1.5.5 and "other similar direct project-related expenditures."

ARTICLE 11: BASIS OF COMPENSATION

- **Initial Payment**

Paragraph 11.1 of the standard form of agreement requires an initial payment.[29] It is suggested that no initial payment be agreed to by the school district and that the word "None" be inserted in the space provided in the paragraph for the amount of the initial payment. If employment of the Architect is contingent upon successful passage of a bond issue, that contingency should also be stated.

29. Paragraph 1.5.7 in B141-1997.

- **Basic Compensation**

Paragraph 11.2 provides for the basis of the compensation to the architect for his performance of basic services. Subparagraph 11.2.2 designates the amount of the fee that will be earned by the architect as the project progresses through each phase. School districts should scrutinize the percentages that the architect seeks for each phase. Some architects may request a disproportionately high percentage of their fee during the early phases of the agreement. Not only would disproportionately high percentages during the early phases of the work affect cash flow, but may also result in unjustified fees to the architect should the project be suspended or abandoned or should the agreement with the architect be terminated with or without cause. The fees to be paid as the project progresses should be commensurate with the services performed.[30]

- **Compensation for Additional Services of Consultants**

Paragraph 11.3.3 of the agreement sets forth the amounts to be paid to the architect should the architect need to use the services of consultants, such as structural, mechanical and electrical engineers. The agreement generally states that the architect will be paid a multiplier of what the consultant actually charges to the architect. The multiplier should be closely scrutinized to ensure that it is not excessive. Although multipliers of up to 1.5 are not uncommon, it is recommended that school districts negotiate for either no multiplier or a substantially lower multiplier.

From the architect's perspective, a multiplier is justified because of the extra work that must be performed by the architect to coordinate the work of the consultant. The AIA has justified the use of multipliers by claiming that when the architect is incurring reimbursable expenses, the architect "is, in effect, extending credit to the owner."

From the owner's perspective, to the extent administration of such consultants takes place to help the architect perform basic services, the architect is already being paid for the service. To the extent such efforts are not basic services, the hourly billing rate will be imposed, which includes profit. Where the architect insists upon a multiplier greater than 1.0, the architect may be willing to limit the amount to be paid to reflect the time spent in conjunction with the consultant at the normal hourly rate, not to exceed the amount determined by using the multiplier.

SUGGESTED SUBSTITUTION:

11.3.3 FOR ADDITIONAL SERVICES OF CONSULTANTS, including additional structural, mechanical and electrical engineering services and those provided under Subparagraph 3.4.19 or identified in Article 12 as part of Additional Services, a multiple of _____ (__) times the amounts billed to the Architect for such services, or compensation earned by the Architect at the hourly rates set forth in paragraph 11.3.2 for the Work performed in connection with the services of consultants plus the consultants' fee, whichever is less.

[1.5.3 in B141-1997]

30. Paragraph 1.5.7 in B141-1997 stipulates that after an initial payment, the owner shall pay monthly and "where applicable, shall be in proportion to services performed within each phase of service . . ."

- **Reimbursable Expenses**

Paragraph 11.4.1 sets forth the amount at which reimbursable expenses will be billed to the school district.[31] Such expenses should be billed at one hundred percent of their cost to the architect and not at a multiple of their cost.

- **Annual Adjustment for Additional Services**

Paragraph 11.5.3 of the standard form agreement authorizes the architect to increase the rates and multiples set forth for additional services annually in accordance with salary review practices of the architect.[32] School districts should object to such a provision and delete the paragraph from the agreement.

ARTICLE 12: OTHER CONDITIONS OR SERVICES[33]

Although the AIA standard form of agreement is quite comprehensive, school districts should consider adding other provisions.

- **Written Record of Meetings**

A paragraph should be added making it a responsibility of the architect as a part of basic services, to make a written record of all meetings, conferences, discussions and decisions made between or among the owner, architect and contractor during all phases of the project and concerning any material condition in the requirements, scope, performance and/or sequences of the work and provide a copy of such records to the owner and contractor upon request. This keeps the owner informed about the progress of construction on an ongoing basis.

SUGGESTED ADDITION:

12.1 It shall be the duty of the Architect throughout the term of this Agreement, as part of Basic Services, to make a prompt written record of all meetings, conferences, discussions and decisions made between and/or among the Owner, Architect, and Contractor during all phases of the Project and concerning any material condition in the requirements, scope, performance and/or sequence of the Work and to provide promptly a copy of such record to the Owner or the Contractor.

[not included in B141-1997]

- **Insurance Requirements**

As mentioned previously, the form agreement contains no insurance requirements. Provisions should be added which require the architect to purchase and maintain in force and effect liability and other insurances that may be appropriate.

An area of particular concern is the architect's professional liability insurance. Such insurance is necessary to ensure the availability of a fund to pay any claims that result from the architect's negligence. However, there are several problems that must be addressed with respect to such insurance.

There is the practical problem of determining the amount or level of professional liability insurance required. Modest projects may justify only $250,000 of professional liability insurance while others may require substantially more insurance. School districts should determine from both their insurance brokers and the architects from whom they will be soliciting proposals the level of professional liability insurance

31. Paragraph 1.5.4 in B141-1997.
32. Paragraph 1.5.6 in B141-1997.
33. Paragraph 1.4.2 in B141-1997.

required for the project and the rationale for their recommendations.

Determining the proper level of insurance has consequences aside from establishing the size of the available insurance proceeds should any claims be made successfully against the architect. It could also affect the architectural firms qualified to make proposals. Some firms may be unable or unwilling to secure insurance at the levels established by the school district, especially with respect to small projects. Some architects carry no professional liability as a rule and will obtain such insurance only if its cost is directly passed on to the school district. Other architects carry only modest amounts of insurance, $250,000 for example, and would be unwilling to increase the coverage for one project, unless the cost were passed on to the school district. Therefore, when establishing the level of professional liability insurance, school districts must do so recognizing that it may disqualify one or more otherwise qualified firms or that it may result in additional costs to the school district.

The second problem associated with professional liability insurance stems from the fact that such insurance is written on a "claims made" basis rather than on a "claims accrued" basis. A "claims made" policy is one that affords coverage for any covered claims that are made or asserted during the term of the policy, regardless of when the claim accrued. Claims that may accrue during the term of the policy, but which are not made or asserted until after the policy expires, are not covered. As a result, any professional liability insurance that is required and provided with respect to a school district project may be of no value if claims are made after the policy expires.

Having identified the problem, the more critical question is how to solve it. The best among the several possibilities can only be determined by considering the nature and size of the project, comparative cost of the various options to both the architect and the school district, and the willingness of the architect to agree to a particular option.

PROBLEMS WITH "CLAIMS MADE" INSURANCE

Assume that a school district decides to construct an $8,000,000 addition to an existing school building and that it determines that $1,000,000 of professional liability insurance should be required of the architect. The architect regularly carries only $250,000 of such insurance and agrees to work on the project only after the school district agrees to pay the additional $15,000 in annual premiums that the increased insurance will cost the architect. The insurance is effective beginning January 1, 1990 and the term of the policy is one year. The project is completed during 1990 and no defects are discovered. Beginning on January 1, 1991, the architect's insurance reverts back to the level of $250,000. Two years later, a major structural defect is discovered and is attributable to the architect's negligence. The repair cost is $900,000. The architect has no assets of any significance and the available insurance is only $250,000. Even though the architect's negligence took place while $1,000,000 of insurance was in effect, because the claim was not made or asserted until after the expiration of the higher coverage, such coverage is not available to the school district.

One option would require the architect to continue coverage at specified levels for a specified period of time after the project is completed. Unless the architect regularly maintains that level of insurance, this option

probably would not be acceptable to the architect unless the school district agreed to pay the premium. If this option is selected, suitable provisions must be agreed upon to prevent any premature lapse of the policy.

Another option may be to insist that the architect provide a clear letter of credit in the amount of the desired insurance and for the period of time deemed reasonable. Such a letter of credit probably would cost less than insurance, but unless the architect is financially secure with relatively liquid assets at levels substantially higher than the amount of credit, such a letter may not be obtainable.

SUGGESTED ADDITION:

12.2 The Architect agrees to maintain at no additional cost to the School District the following insurances until the termination of services of this Agreement:

a. workers' compensation coverage that meets or exceeds legal requirements;

b. automobile and truck liability coverage with a minimum combined single limit of liability of $500,000; and

c. architects and engineers professional liability insurance coverage with minimum limits of $500,000 per claim and/or occurrence prior to the start of construction and $1,000,000 limit per claim and/or occurrence following the start of construction. With respect to any of the insurance policies provided by the Architect pursuant to this Agreement which are "claims made" policies, in the event at any time any such policies are canceled or not renewed, the Architect shall provide a substitute insurance policy(ies) with terms and conditions and in amounts which comply with the terms of this Agreement and which provides for retroactive coverage to the date of cancellation or nonrenewal to fill any gaps in coverage which may exist due to the cancellation or nonrenewal of the prior "claims made" policy(ies). With respect to all "claims made" policies which are renewed, the Architect shall provide coverage retroactive to the date of commencement of work under this Agreement. All said substitute or renewed "claims made" policies shall be maintained in full force and effect for three (3) years from the date of completion of the Project.

cont'd

[not included in B141-1997]

- **Specific Personnel**

An architectural firm may be selected because of specific personnel in the firm. If the school district desires that the work be performed by specific personnel, a provision should be added setting forth the personnel who will be assigned to the project and the function of said personnel.

SUGGESTED ADDITION:

12.3 The Architect will use the following individuals to perform its Work of the Project:

_____

_____

[not included in B141-1997]

CHANGES TO THE GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION—AIA DOCUMENT A201-1987

Any agreement between a school district and an architect will contain provisions describing the role of the parties during the construction phase of the project vis-à-vis the contractor(s). Consequently, the agreement ultimately achieved between the school district and the contractor must be coordinated with the owner-architect agreement.

If the AIA forms are used, the owner-contractor agreement must similarly be coordinated with the owner-architect agreement. In their unaltered form, the AIA documents are coordinated, but if changes and modifications are made to one, corresponding changes must be made to the other.

The suggestions for changes to the General Conditions that follow are made in light of the suggested changes to the owner-architect agreement as set forth above. Therefore, the following may be appropriate and are recommended only if the corresponding changes are made to the owner-architect agreement.

It is beyond the scope of the monograph to analyze the General Conditions in detail or to recommend alterations unrelated to the architect's role with respect to the project. Instead, only those provisions of the General Conditions which relate to the architect's role and to the owner-architect agreement will be referenced and recommendations for change will be made only to the extent necessary to coordinate those provisions with recommended changes to the owner-architect agreement. In addition, because the rationale for the changes to the General Conditions tracks the rationale for the corresponding changes to the owner-architect agreement, the rationale will not be repeated in this section. Instead, the recommended substitution alone will be provided. The numbers correspond to the numbers of those paragraphs of the General Conditions of the Contract for Construction, AIA Document A201-1987 that need modification to coordinate with the owner-architect agreement. Corresponding paragraphs in A201-1997 are noted in brackets.

- **Ownership and Use of Drawings, Specifications and Other Documents**

SUGGESTED SUBSTITUTION:
ALTERNATIVE #1

1.3.1 The Drawings, Specifications and other documents prepared by the Architect are instruments of the Architect's services through which the Work to be executed by the Contractor is described. The Contractor may retain one contract record set. Neither the Contractor nor any Subcontractor, Sub-subcontractor or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications and other documents prepared by the Architect, and ~~[unless otherwise indicated]~~, except as otherwise provided in the Agreement between the Owner and the Architect, the Architect shall be deemed author of them and will retain all common law, statutory and other reserved rights, in addition to the copyright. All copies of them, except the Contractor's record set, shall be returned or suitably accounted for to the Architect, on request, upon completion of the Work. The Drawings, Specifications and other documents prepared by the Architect, and copies thereof furnished to the Contractor, are for use ~~[solely]~~ with respect to this Project, the Owner's use and occupancy of the Project, and for additions to the Project. They are not to be used by the Contractor or any Subcontractor, Sub-subcontractor ~~[or for additions to this Project outside the scope of the Work]~~ without the specific written consent of the Owner and Architect. The Contrac-

tor, Subcontractors, Sub-subcontractors and material and equipment suppliers are granted a limited license to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the Architect appropriate to and for use in the execution of their Work under the Contract Documents. All copies made under this license shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by the Architect. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Architect's copyright or other reserved rights.

[1.6.1 in A201-1997[34]]

ALTERNATIVE #2

1.3.1 The Drawings, Specifications and other documents prepared by the Architect are instruments of the Architect's service through which the Work to be executed by the Contractor is described. The Contractor may retain one contract record set. Neither the Contractor nor any Subcontractor, Sub-subcontractor or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications and other documents prepared by the Architect~~[, and unless otherwise indicated the Architect shall be deemed the author of them]~~. The Owner shall be deemed to be the owner of all Drawings, Specifications and other documents prepared by the Architect with respect to this Project and will retain all common law, statutory and other reserved rights, in addition to copyright. All copies of them except the Contractor's record set, shall be returned or suitably accounted for to the Owner, ~~[Architect]~~ upon request, upon completion of the Work. The Drawings, Specifications and other documents prepared by the Architect, and copies thereof furnished to the Contractor, are for use by the Contractor solely with respect to this Project. They are not to be used by the Contractor, any Subcontractor, or any Sub-subcontractor or material or equipment supplier on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner ~~[and Architect]~~. The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are granted a limited license to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the Architect appropriate to and for use in the execution of their Work under the Contract Documents. All copies made under this license shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by the Architect. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Owner's ~~[Architect's]~~ copyright or other reserved rights.

[1.6.1 in A201-1997]

SUGGESTED ADDITION:

1.3.1.1 The Contractor shall certify, when available, the accuracy of a set of reproducible record drawings prepared by the

34. Paragraph 1.6.1 in A201-1997 includes documents in electronic form and documents prepared by the architect's consultants. The paragraph grants an "authorization" rather than a "license."

Architect showing significant changes in the Work made during construction.

[not included in A201-1997]

- **Architect's Administration of the Contract**

SUGGESTED SUBSTITUTION:

4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents and the Agreement between the Owner and the Architect, and will be the Owner's representative (1) during construction, (2) until final payment is ~~[due]~~ made and (3) with the Owner's concurrence, from time to time during the correction period described in Paragraph 12.2. The Architect will have authority to act on behalf of the Owner ~~[only]~~ to the extent provided in the Contract Documents and allowed by law, unless otherwise modified by written instrument in accordance with other provisions of the Contract.

[4.2.1 in A201-1997[35]]

- **Site Visit**

SUGGESTED SUBSTITUTION:

4.2.2 The Architect shall visit the site ~~[at intervals]~~ not less than once per week while Work is in progress and as often as necessary and appropriate to the stage of construction ~~[to become generally familiar with the progress and quality of the completed Work and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check quality or quantity of the Work.]~~(with particular emphasis on structural work) to inspect the site and Work, to familiarize himself with the progress and quality of the Work, and to determine for the Owner's benefit and protection if the Work is proceeding in accordance with the intent of the Contract Documents and the construction schedule. The Architect shall use reasonable care to guard the Owner against defects and deficiencies in the Work and the Contractor's failure to carry out the Work in accordance with the Contract Documents and the construction schedule. On the basis of onsite observations and inspections as an architect, the Architect will keep the Owner informed of progress of the Work ~~[, and will endeavor to guard the Owner against defects and deficiencies in the Work]~~.

[4.2.2 in A201-1997[36]]

- **Architect's Responsibility for Contractor's Work**

SUGGESTED SUBSTITUTION:

4.2.3 The Architect will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work ~~[, since these are solely the Contractor's responsibility as provided in Paragraph 3.3]~~ except to ensure that the Work is in accordance with the Contract Documents all as set

35. Paragraph 4.2.1 in A201-1997 limits the correction period to one year.

36. Paragraph 4.2.2 in A201-1997 notes that the architect is acting as the owner's representative during site visits.

forth in paragraph 4.2.2 hereof. Except as provided elsewhere in this Agreement or in the Agreement between the Owner and the Architect, the Architect will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work. Notwithstanding the foregoing, in the event the Architect becomes aware that the Contractor is using means, methods, techniques, sequences or procedures, or safety precautions and programs in connection with the Work which create a risk to persons or property or in violation of customary safety practices, OSHA standards, or Department of Labor and Industry regulations, the Architect shall have authority to take appropriate action, including, if necessary, shutting down the Project. The Architect will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents, unless the Architect knew or should have known that the Contractor was failing to carry out the Work in accordance with the Contract Documents.

[4.2.3 in A201-1997]

- **Communication Facilitating Contract Administration**

SUGGESTED SUBSTITUTION:

4.2.4 ~~[Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized,]~~ The Owner and Contractor shall ~~[endeavor to]~~ communicate through the Architect except (1) as may be otherwise provided in the Contract Documents; (2) when direct communications have been specifically authorized; or (3) when such communication has been attempted and could not reasonably be accomplished in a timely manner. Where direct communication between Owner and Contractor has occurred, the Owner and Contractor shall promptly and jointly document the nature and results of the communication as well as the reason for the direct communication and shall provide a copy of said documentation to the Architect. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with the Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner. The Architect will conduct regular site meetings and issue reports. Each Contractor (or major Subcontractor) shall attend and report on the status of his work. The primary purpose of these meetings is to observe and coordinate the execution of the Work. The reports issued shall be the official record and, unless subsequently objected to, changed or modified in any way, shall constitute written notice, direction, decisions, etc. relating to the Work to all concerned. Reports will be issued to the Owner, and to all Contractors who shall be responsible for advising their Subcontractors and material suppliers of pertinent directions and decisions.

[4.2.4 in A201-1997]

- **Aesthetic Effect**

SUGGESTED SUBSTITUTION:

4.2.13 As to the Contractor, the Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

[4.2.13 in A201-1997]

- **Claims and Disputes**

SUGGESTED SUBSTITUTION:

4.3.1 Definition. A Claim is a demand or assertion by ~~[one of the parties]~~ the Owner or Contractor seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be made by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

There are various provisions in the General Conditions of the Contract for Construction that reference arbitration.[37] If arbitration is not permitted under the owner-architect agreement and is not to be permitted under the owner-contractor agreement, all references to arbitration should be deleted. The following suggested substitutions are appropriate only if arbitration is not sanctioned under the agreements.

SUGGESTED SUBSTITUTION:

4.3.2 Decision of Architect. Claims, including those alleging an error or omission, by the Architect, shall be referred initially to the Architect for action as provided in Paragraph 4.4. A decision by the Architect, as provided in Subparagraph 4.4.4, shall be required as a condition precedent to ~~[arbitration or]~~ litigation of a Claim between the Contractor and Owner as to all such matters arising prior to the date final payment is due, regardless of (1) whether such matters relate to execution and progress of the Work or (2) the extent to which the Work has been completed. The decision by the Architect in response to a Claim shall not be a condition precedent to ~~[arbitration or]~~ litigation in the event (1) the position of Architect is vacant, (2) the Architect has not received evidence or has failed to render a decision within agreed time limits, (3) the Architect has failed to take action required under Subparagraph 4.4.4 within 30 days after the Claim is made, (4) 45 days have passed after the Claim has been referred to the Architect or (5) the Claim relates to a mechanic's lien.

[4.4.1 in A201-1997[38]]

SUGGESTED SUBSTITUTION:

4.3.4 Continuing Contract Performance. Pending final resolution of a Claim ~~[including arbitration]~~, unless otherwise agreed in writing the Contractor, shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

[4.3.3 in A201-1997[39]]

37. See primarily Paragraph 4.5 in A201-1987 and Paragraph 4.6 in A201-1997. The 1997 edition of the General Conditions requires an attempt at mediation in Paragraph 4.5.

38. Paragraph 4.4.1 in A201-1997 excludes hazardous material claims. It makes the architect's decision on covered claims a condition precedent to mediation as well as arbitration and litigation. The architect's decision no longer is a condition precedent if 30 or more days without a decision have passed after the claim has been referred to the architect. The architect is prohibited from deciding disputes between the contractor and persons or entities other than the owner.

39. Paragraph 4.3.3 in A201-1997 references subparagraph 9.7.1 and Article 14 which allow the contractor to stop work under certain circumstances.

SUGGESTED SUBSTITUTION:

4.4.4 If a Claim has not been resolved after consideration of the foregoing and of further evidence presented by the parties or requested by the Architect, the Architect will notify the parties in writing that the Architect's decision will be made within seven days, which decision shall be final and binding on the parties but subject to ~~[arbitration]~~ litigation. Upon expiration of such time period, the Architect will render to the parties the Architect's written decision relative to the Claim, including any change in the Contract Sum or Contract Time or both. If there is a surety and there appears to be a possibility of a Contractor's default, the Architect may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

[4.4.4 and 4.4.7 in A201-1997[40]]

- **Arbitration**

If arbitration is not to be permitted, all of paragraph 4.5 of A201-1987 (paragraph 4.6 in A201-1997) should be deleted. Where arbitration is to be allowed, a provision should be added which requires joinder of all necessary parties.

SUGGESTED ADDITION:

4.5.8 Notwithstanding subparagraph 4.5.5,[41] this agreement to arbitrate shall include the obligation to include as part of any arbitration proceedings, by joinder or consolidation, all person or entities not a party to this agreement to the extent necessary for resolution of the matter in controversy. All contracts relating to this Project shall include this provision as part of an agreement to arbitrate. The foregoing agreement to arbitrate, including the obligation to arbitrate with an additional person or entity by joinder or consolidation, shall be specifically enforceable in accordance with applicable law in any court having jurisdiction. Joinder or consolidation of necessary or interested parties shall be a precondition to the obligation to arbitrate.

[not included in A201-1997]

ANALYSIS OF AIA DOCUMENT B141-1997

If the revised 1997 version of the B141 is used, then a school attorney may apply the preceding analysis of the 1987 standard form to the corresponding language in the 1997 edition. In addition, a number of other provisions in the 1997 agreement must be carefully analyzed and appropriate modifications made.

- **Architect's Responsibilities**

The new owner-architect agreement form provides that the owner's and architect's respective responsibilities be listed under Article 1.2. It expands the architect's responsibilities with respect to confidentiality and conflict of interest issues but still does not make clear that the architect works for and on behalf of the district and is obligated to protect the school district and to ensure that the contractor adheres to the construction documents. Suitable modifying language to that effect should be incorporated into the agreement by the school district. Further specification of the architect's duties under the agreement can be set forth in more detail in the accompanying standard form of architect's services intended to be used in conjunction with the standard form of agreement between owner and architect.

40. Paragraph 4.4.4 in A201-1997 eliminates the first 2 sentences reprinted here. Paragraph 4.4.7 permits the owner as well as the architect to request the surety's assistance.

41. Paragraph 4.6.4 in A201-1997.

- **District's Right to Reproducible Documents**

Paragraph 1.3.2 should be modified to ensure that the school district has the right to make copies of all drawings, specifications, and documents which can be used by the district for occupancy of the project, for additions to the project, and the completion of the project by others.

- **Changes in Services**

School districts should note that a new section, paragraph 1.3.3 called "Changes in Services," which describes circumstances under which the architect may be entitled to adjustments in compensation and time of performance. Paragraph 1.3.3.1 provides that "except for change due to the fault of the architect, change in services of the architect shall entitle the architect to an adjustment in compensation pursuant to paragraph 1.5.2" and reimbursable expenses.

Paragraph 1.5.2 provides space for the parties to specify the method(s) of calculating the adjustment in compensation to the architect for changes in services. Different calculation methods for different specific services may be delineated, or the parties may agree to determine such adjustment to compensation "in an equitable manner" if no specific method of adjustment is specified. School districts should specify the precise methods of calculating compensation adjustments that apply to specific services.

Paragraphs 1.5.3 and 1.5.4 address compensation for a change in services of the architect's consultants and for reimbursable expenses. Under these paragraphs this additional compensation is to be computed as a (negotiable) multiple of the amounts billed to or incurred by the architect for such services or expenses. Although architects may typically try to bill for consultants' services at 1.5 times the amount billed to the architect, school district should insist on a multiplier of no higher than 1.2 or 1.3. Similarly, school districts should take the position that for reimbursable expenses of the architect, the multiplier should be 1.0 (i.e., the direct expense to the architect).

- **Mediation and Arbitration**

The 1997 version of B141 has added provisions in paragraphs 1.3.4 and 1.3.5 for mediation of claims and disputes. Arbitration is still provided for in the event that the disputes are unable to be settled through mediation. It is recommended that school districts generally strike the language pertaining to mandatory mediation and/or arbitration. However, a school district may want to retain the option of these forms of alternative dispute resolution by substituting language providing for voluntary mediation and/or arbitration if agreed to by the parties. Another alternative is to limit the applicability of arbitration to certain defined disputes (such as claims below a certain dollar amount). Allowing for a pretrial discovery period in the event of arbitration may also be advisable if arbitration is retained as an option in the agreement.

- **Termination**

Paragraph 1.3.8 allows the owner to terminate the agreement for any reason with at least seven days written notice to the architect. Either party may terminate with at least seven days written notice for the other party's failure to substantially perform in the absence of fault of the party invoking termination of the agreement. The architect may terminate the contract if the project or the architect services are suspended for more than 90 consecutive days upon at least seven days written notice. (The 1987 version had permitted such termination for suspen-

sion of the project following a much shorter period, i.e., 30 or more consecutive days.)

- **Supplemental Standard Form of Architect Services**

With regard to the supplemental Standard Form of Architect Services, Design and Contract Administration (AIA Document B141-1997), the following changes should be made by the school district:

a. Filing of government documents

Paragraph 2.1.6 should be changed to require the architect to assume responsibility for filing documents required for the approval by governmental authorities having jurisdiction over the project. As a practical matter, school district officials may not generally be familiar with all of the necessary documents to be filed. Therefore, this responsibility should be delegated to the architect (who should be familiar with these requirements), subject to the review and approval by the school district. Any changes requested by reviewing authorities, if approved by the district, should be made by the architect at no additional cost to the district.

b. Owner's representative

Paragraph 2.1.6.3 indicates that the architect shall be a "representative of and shall advise and consult with the owner;" however, paragraph 2.6.1.8 provides that when interpreting the contract documents between the owner and contractor, the architect "shall not show partiality to either." The school district should amend the language to make it clear that the architect works for and on behalf of the district and is obligated to protect the school district and to ensure that the contractor adheres to the construction documents.

c. Bid assistance

Paragraph 2.4.4.2 provides that the architect shall "assist" the owner in the development and preparation of bidding and procurement information and forms. This should be changed to require the architect to prepare those documents subject to the review and approval of the school district.

d. Notice and correction of defects

Paragraph 2.6.2.2 requires the architect to report to the district known deviations in the work from the contract documents. Although it acknowledges the architect's responsibility for its own negligent acts or omissions, districts should modify the language to clarify that the architect is responsible at no additional cost to the district to provide services made necessary by major defects or deficiencies in the work which the architect should have discovered through reasonable care.

e. Access to the work

Paragraph 2.6.2.3 should be amended to provide that both the owner and the architect shall have access at all times to the work in preparation or progress.

f. Rejection of nonconforming work

Paragraph 2.6.2.5 (which states that the architect "shall have the authority to reject work that does not conform to the contract documents") should be changed to require the architect to reject non-conforming work of the contractor, subcontractors, material and equipment suppliers. The architect should also be required

to promptly notify the owner of its intent to reject such nonconforming work unless the district objects to the rejection in writing within 24 hours of such notification. Performance of any additional inspection or testing which would result in additional cost to the district should require advance notice and approval by the district.

g. Standard of care

Appropriate language should be added to the form of architect's services to require that the architect's work be in accordance with the standards of the profession.

h. Maintenance of insurance

A requirement should be added that the architect maintain and properly document appropriate workers' compensation, automobile and truck liability, and professional liability insurance.

i. Operations manuals

The architect should also be required to ensure that the contractor provide applicable operations manuals and appropriate training for district personnel in the operation of mechanical, electrical, heating and air conditioning systems installed by the contractor. This should be included as a requirement in the bid documents.

j. Program information

Paragraph 1.2.2 places responsibility on the owner for furnishing information relating to the program, land surveys and technical engineering for the project. But paragraph 2.8.3 provides that at the time of the contracting, the parties may agree that any or all of these services will be provided or furnished by the architect.

k. Site visits

Paragraph 6.2.1 provides that the architect shall visit the site at intervals appropriate to the stage of the project. School districts may want to require the architect to make periodic on-site visits at least once a week to ensure that the architect is familiar with the quality of the work for the district's benefit. The district should also require that the architect use reasonable care to guard the district against defects and deficiencies in the work performed.

Paragraph 2.8 permits the parties to specify the number of submittal reviews, sites visits, and inspections to determine both substantial and final completion before triggering the architect's right to a compensation adjustment under the change in services provision. It also allows the parties to identify any other services that form part of the agreement between the owner and the architect.

l. Performance and design criteria

Paragraph 2.6.4.3 addresses the architect's responsibility to specify appropriate performance and design criteria for any professional design services or certifications related to the systems materials or equipment specifically required of the contract by the contract documents.

m. Project completion

Paragraphs 2.6.5 and 2.6.6 contain extensive descriptions of architect services pertaining to changes in the work and project close-out. Article 2.7 also provides for two meetings between the architect and owner after substantial completion to review facility operation services related to the

project. This requirement should aid seamless integration of the operational functionality of the project once completed.

See following table for more analysis of AIA Document B141

CONCLUSION

As is readily apparent, the agreement with the architect is an important document with important consequences. It should not be an afterthought in the selection of an architect. On the contrary, the agreement should be one of the tools used in the selection process. An architect who is unwilling to make changes to the standard forms of agreement necessary to fully protect the school district's interest perhaps is an architect with whom the school district does not want to deal.

Owner Expectations vs. Actual Effect of AIA Document B141

DISPARITY BETWEEN OWNER EXPECTATIONS AND ACTUAL EFFECT OF AMERICAN INSTITUTE OF ARCHITECTS DOCUMENT B141 Standard Form of Agreement Between Owner and Architect				
ISSUE	TYPICAL OWNER EXPECTATION	1987 FORM B141	1997 FORM B141	EFFECT IF LANGUAGE IS NOT CHANGED
Ability to recover damages arising from untimely or defective design services.	Owner should be able to recover from Architect all damages arising from untimely or defective services.	Owner waives right of subrogation against Architect for damages covered by Owner's property insurance during construction. (Para. 9.4)	In addition to waiver of subrogation for losses covered by Owner's property insurance (Para. 1.3.7.4), Owner[1] waives consequential damages for all claims arising out of or relating to agreement, including wrongful termination by Architect. (Para. 1.3.6)	Document B141-1997 does not define the term "consequential damages." Under most common law definitions,[2] Owner would waive all damages except the direct cost of correcting the defective design.[3]
Ability to terminate architectural services agreement for convenience of the Owner.	Owner should be able to terminate agreement for Owner's convenience, so long as Architect is paid in full for all services performed and costs committed or incurred through date of termination.	Owner may terminate only if project is "permanently abandoned," and only upon payment to Architect of termination expenses of between five and twenty percent of compensation earned to date, depending upon when termination occurs. (Para. 8.3, 8.6, and 8.7)	Owner may terminate for its convenience, but only upon payment for all services performed, all expenses directly attributable to termination, plus Architect's anticipated profit on the remainder of services not performed. (Para. 1.3.8.7)	The economic consequences of termination for convenience are equivalent to those for breach of contract by Owner. In either event, Architect is entitled to be placed in the same position it would have occupied had the breach or termination not occurred.[4]

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ISSUE	EXPECTATION	B141-1987	B141-1997	EFFECT IF NO CHANGE
Ownership of design documents.	Owner expects to own design documents prepared for it by Architect, subject to reasonable limitations to protect Architect from liability for re-use or misuse.	Architect owns and holds copyright to drawings and specifications. Drawings and specifications may not be used by Owner for additions to or completion of project by others, without Architect's written agreement. (Para. 6.1)	Architect owns and holds copyrights to drawings and specifications. Owner has a nonexclusive license to use the design documents only so long as Owner makes prompt payment to Architect. Termination by either Owner or Architect terminates Owner's license. Owner may regain use of design documents only when Architect is "adjudged" to be in default. (Para. 1.3.2)	In the event of a dispute leading to non-payment of any amount claimed by Architect under B141-1997, Architect can terminate agreement and Owner's license to use design documents. Owner cannot regain use of documents until Architect is adjudged to be in default.[5] Under copyright law, Owner can be enjoined from using design documents without valid license.[6]
Overall responsibility for design.	Architect should be responsible for the total design of the project, whether designed by Architect or by others at Architect's direction.	Architect has no express right to delegate design responsibility to Contractor.	Architect may include specifications that require Contractor to provide professional design services for designated systems, materials or equipment. If so specified, Contractor is responsible for those design services and Architect is entitled to rely upon the adequacy, accuracy, and completeness of such services. (Para. 3.12.10)	Owner's sole recourse in the event of a defect in delegated design services is a claim against Contractor or subcontractor that performed those services.[7] Contractor or subcontractor may, or may not, have professional errors and omissions insurance to cover defective design services.[8]
Ability to pledge or assign architectural services agreement to Owner's lender.	Agreement for architectural services should be assignable to Owner's lender on terms acceptable to lender.	Agreement cannot be assigned by Owner without permission of Architect. (Para. 9.6). Owner cannot assign or pledge right to use plans and specifications without written agreement of Architect. (Para. 6.1 and 6.2)	Agreement may be assigned without permission of Architect, but only if lender assumes all of Owner's rights and obligations under agreement, including any obligation for past-due payments. (Para. 1.3.7.9). Assignment of right to use plans or specifications requires Architect's consent.[9] (Para. 1.3.2.3)	Most lenders will not accept an assignment that requires lender to make past-due payments, particularly where lender may have already released to Owner funds earmarked for such past-due payments.[10]

ISSUE	EXPECTATION	B141-1987	B141-1997	EFFECT IF NO CHANGE
Responsibility for inspection of ongoing construction work.	Many Owners expect Architect to undertake detailed inspections of ongoing construction work to spot defects on non-compliant work.	Architect will visit site to become "generally familiar" with the work, to "endeavor to guard" Owner against defects and deficiencies, and to determine "in general" if work is in accordance with construction contract. Architect not required to make exhaustive inspections to check the quality or quantity of the construction work. (Para. 2.6.5)	Same as 1987 form. (Para. 2.6.2.1)	If Owner needs or requires detailed on-site inspection, the form agreement must be modified or a separate inspector retained.[11]
Modification of duties and responsibilities of Architect.	Owner and Architect should be able to modify duties and responsibilities of Architect by mutual agreement.	Consent of Contractor required to modify duties and responsibilities of Architect. (Para. 2.6.3)	Duties and responsibilities of Architect may not be modified without consent of Contractor, which consent shall not unreasonably be withheld. (Para. 2.6.1.4)	Contractor has right to reject modifications of Owner/Architect agreement to which Contractor is not a party. "Reasonableness" limitation in B141-1997 limits potential for abuse.
Applicable law.	Law of state in which project is located should apply to contract for architectural services.	Contract is controlled by law of state in which Architect's principal place of business is located. (Para. 9.1)	Same as 1987 form. (Para. 1.4.2)	Design services agreement may be governed by law different from that controlling related agreements such as construction contract, construction subcontracts, financing and development agreements.
Ability of Owner to recover from Contractor for damages caused by delayed or defective construction.	Contractor should be responsible to Owner for all damages arising from defective or delayed performance by Contractor or subcontractors.	Only limit on Contractor's liability is Owner's waiver of subrogation for losses covered by property insurance. (Para. 11.3.7)	In addition to waiver of subrogation for damage to insured property, Owner[12] waives all claims against Contractor for consequential damages, including but not limited to rental expenses, loss of use, income profit, financing, business reputation, and productivity. (Para. 4.3.10)	Waiver of consequential damages does not preclude an award of "liquidated direct damages," when the contract includes a provision for liquidated damages.[13] However, a liquidated damages provision that liquidates only "direct" damages may not be enforceable.[14]

ISSUE	EXPECTATION	B141-1987	B141-1997	EFFECT IF NO CHANGE
Ability of Owner to terminate construction contract for convenience.	Owner should be able to terminate contract for Owner's convenience, so long as Contractor is paid in full for all work performed and costs committed or incurred through date of termination.	Contract may be terminated only upon default of Contractor. (Para. 14.2.1). Owner has no right to terminate for its convenience.	Owner may terminate for convenience, but only upon paying Contractor all costs incurred by reason of the termination and Contractor's anticipated profit on the remainder of the contract. (Para. 14.4)	Remedy for termination for convenience is equivalent to remedy for breach of contract by Owner. In either event, Contractor is entitled to be placed in as good a position as Contractor would have been in had the contract been performed.[15]
Responsibility for delay on projects involving multiple prime contractors.	Multiple contractors should be responsible to one another for consequences of their own delays or defects.	Costs caused by delays, improperly timed activities or defective construction will be borne by the responsible party. (Para. 6.2.3)	Owner is responsible to each contractor for damage due to delays, improperly timed activities or defective construction of other contractors. Owner is responsible, to the extent that it is able, for recovering from the contractor that is at fault. (Para. 6.2.3)	New provision increases the risk of Owner who employs multiple contractors. Waiver of consequential damages may create situation where Owner is liable to affected contractor, but unable to recover from responsible contractor.[16]
Correction by Owner of defective work.	Owner should be able to correct defective or incomplete work after giving Contractor notice and a reasonable opportunity to cure.	Owner may correct or complete work, but only after giving Contractor two consecutive seven-day notices and obtaining approval of Architect. (Para. 2.4.1)	Owner may complete or correct work, but only after giving Contractor a first, seven-day notice, a second, three-day notice, and obtaining approval of Architect. (Para. 2.4.1)	Failure of Owner to comply with complicated notice and consent provisions will waive any claim against Contractor for cost of repairs or remedial work.
Resolution of disputes.	Construction disputes should be resolved in one expeditious proceeding involving all concerned parties.	All disputes must first be submitted to Architect for resolution. Party who disagrees with Architect's decision may demand arbitration without the Architect's consent. (Para. 4.3)	Same as 1987 form, except that sixty days must be allowed for mediation between Architect's decision and arbitration. (Para. 4.5.2)	Early mediation may be ineffective. Inability to join Architect and Contractor in same arbitration makes it difficult to resolve issues that involve both design and construction errors.[17] Arbitration is frequently an unfavorable forum for Owner.[18]

ISSUE	EXPECTATION	B141-1987	B141-1997	EFFECT IF NO CHANGE
Information concerning Owner's financing.	Owner's financing is Owner's private business.	Owner must provide Contractor with reasonable evidence of Owner's financial arrangements as a precondition to Contractor's commencement or continuation of work. (Para. 2.2.1)	In addition to providing information required under 1987 form, Owner is prohibited from making any material variation in its financial arrangements without prior notice to Contractor. (Para. 2.21)	Many lenders will object to these requirements and will require the Contractor to waive them in writing.
Assignment of construction contract to construction lender.	Construction contract should be assignable to construction lender on terms acceptable to the lender.	Contract cannot be assigned by Owner without permission of Contractor. (Para. 13.2.1)	Contract may be assigned to lender without permission of Contractor, but only if the lender assumes all Owner's rights and obligations under the contract, including any obligation for past-due payments. (Para.13.2).	Most lenders will not accept an assignment that requires the lender to make past-due payments, particularly where the lender may have already released to Owner funds earmarked for such past-due payments. Rather, the lender will agree only to pay the unpaid balance of the contract price to induce Contractor's continued performance.

1. Paragraph 1.3.6 purports to be a "mutual" waiver of consequential damages by both Owner and Architect. However, Paragraph 1.3.8 entitles the Architect to recover defined "Termination Expenses." These expenses include lost profits on the portion of the contract not performed due to termination and other "expenses directly attributable to termination for which the Architect is not otherwise compensated." (Paragraph 1.3.8.7). The broad category of "directly attributable" expenses could be extended to include consequential damages such as salaries of the Architect's personnel who lack work after the termination, premiums for errors and omissions insurance procured for the project, and other office expenses and general overhead for the anticipated duration of the contract. By characterizing a potentially-broad category of consequential damages as Termination Expenses and express contractual remedy, the B141-1997 effectively negates the Architects' waiver of consequential damages in the event of termination that is not the fault of the Architect. (Paragraph 1.3.8)

2. A court or arbitration panel might be guided by any combination of the available definitions of consequential damages. For example, *Corpus Juris Secundum* defines consequential damages as "[those that] are not produced without the concurrence of some other event attributable to the same origin or cause; such damage, loss or injury as does not flow directly and immediately from the act of the party, but only from the consequences or results of such act." 25 C.J.S. Damages § 2 (1966). *Black's Law Dictionary* defines consequential damages as "such damage, loss, or injury as does not flow directly or immediately from the act of the party, but only from some of the consequences or results of such act." *Black's Law Dictionary* 352-252 (5th ed. 1979). AIA Document A201-1997 includes in its definition of consequential damages: "Damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons." A201-1997, Paragraph 4.3.10. Section 2.715 of the Uniform Commercial Code defines consequential damages from a seller's breach of contract as (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to personal property resulting from any breach of warranty.

3. The combined effect of the waiver provision in Paragraph 13.6 of AIA Document B141-1997, and the definitions in AIA Documents B141-1997 and A201-1997, can be highly prejudicial to the Owner. For example, an Owner may generally be held liable to the Contractor for the Contractor's direct costs and damages attributable to defective design. *United States v. Spearin*, 248 U.S. 132, 39 S. Ct. 59, 63 L.Ed.2d 166 (1918). However, these damages of the Contractor would be "consequential" damages from the standpoint of the Architect. Thus, while the Owner would be liable to the Contractor for the Architect's negligent acts or omissions, the Owner would have no third-party right of recovery against the Architect because of the waiver of consequential damages in Paragraph 1.3.6 of AIA Document B141-1997.

4. Typically, damages for breach of contract are limited to those damages necessary to place the non-breaching party in the situation that party would have occupied had the breach not occurred. *Reinstatement of the Law Second*, Contracts 2d, § 356 (1981). In construction projects, payment for work performed, plus the profit on unperformed work is generally sufficient to achieve this end.

5. Under Paragraphs 1.3.6 and 1.3.8.1 of the B141-1997, the Owner will have no claim against the Architect for any consequential damages arising from the Architect's termination of the contract and withholding of design documents, even if a court or arbitration panel finds that the termination was wrongful.

6. *See* Architectural Works Copyright Act, 17 U.S.C. § 101; Value Group, Inc. v. Mendham Lakes Estates, L.P., 800 F. Supp 1228 (D.N.J. 1992) (grant of temporary restraining order prohibiting owner's use of plans and specifications "substantially similar" to those prepared by architect); Richmond Homes Management, Inc. v. Raintree, Inc., 862 F. Supp. 1517, 1523 (W.D. Va. 1994) ("The level of originality required for copyright protection is not high. . . .Rather, a work need only exhibit 'a minimal degree of creativity.'").

7. Paragraph 2.6.2.2 of AIA Document B141-1997 expressly provides that "the Architect shall not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect shall be responsible for the Architects' negligent acts or omissions, but shall not have control over or charge of and shall not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons or entities performing portions of

the Work." (AIA Document B141-1997, Paragraph 2.6.2.2). The defined term "work" includes responsibility for delegated design services under Paragraph 3.12.10 of AIA Document B141-1997.

8. The waiver of consequential damages in the A201-1997 General Conditions would apply to any claim by the Owner against the Contractor for defective design services. Thus, the Owner's remedy against the Contractor for defective design will probably be limited to recovering the direct cost of correcting the design.

9. Under Paragraph 1.3.7.9, the Architect is required to "execute all consents reasonably required to facilitate such assignment." This should include the written consent required of the Architect to assign the rights to use the Architect's design.

10. Typically, the lender will agree only to pay the unpaid balance of the contract price to induce the Architect's continued performance.

11. An Architect does owe a professional duty to the Owner to disapprove and report obviously defective conditions. *Dan Cowling & Associates v. Board of Educ.*, 273 Ark. 214, 618 S.W.2d 158 (1981); *Board of Educ. v. Sargent, Webster*, 146 A.D.2d 190, 539 N.Y. Supp. 2d 814 (1989); *Watson, Watson, Rutland v. Board of Educ.*, 559 So.2d 168 (Ala. 1990); *U.R.S. Co. v. Gulfport-Biloxi Airport Auth.*, 544 So.2d 824 (Miss. 1989).

12. Ostensibly, the waiver of consequential damages is mutual and applies to both the Owner and the Contractor. However, Subparagraph 4.3.10.2 expressly excludes from the waiver all claims by the Contractor for anticipated profit arising directly from the Work. By contrast, a claim by the Owner for lost profits due to defective or delayed work would be construed as a claim for consequential damage that is subject to the waiver. Contractors may, through bookkeeping devices, be able to allocate overhead and other normally "indirect" damages to particular projects, and thereby remove them from the scope of the waiver. *See* Lynn R. Axelroth, *Mutual Waiver of Consequential Damages—the Owner's Perspective*, CONSTRUCTION LAWYER, Jan. 1998 at 11.

13. The author was unable to locate any reported cases or statutes using the term "liquidated direct damages." However, the inclusion of the word "direct" is undoubtedly significant. By permitting the Owner to recover only liquidated "direct" damages, Paragraph 4.3.10 may prevent the Owner from recovering liquidated damages for "indirect" and "consequential" damages such as loss of use, lost revenues and lost profits from delayed completion. Theses are the exact types of damage that most liquidated damages provisions are designed to capture.

14. Under the laws of many states, a liquidated damages provision that liquidates only "direct" damages would not be enforceable because the damages are not "difficult or impossible to calculate." *See* RESTATEMENT (SECOND) OF CONTRACTS, § 356 (1981).

15. Damages for breach of contract are those damages necessary to place the non-breaching party in the situation that party would have occupied had the breach not occurred. RESTATEMENT (SECOND) OF CONTRACTS §§ 344-385 (1981). For a Contractor, this end is achieved upon being paid by the Owner for the work performed, all costs incurred and committed, plus "all costs incurred by reason of the termination" and profit on the unperformed work.

16. In many cases, delay damages paid by the Owner to Contractor "A" on a multiple-prime project would appear as consequential damages to responsible Contractor "B." If the Owner has entered into AIA form contracts waiving consequential damages against both contractors, the Owner may be unable to recover from responsible Contractor "B" despite the Owner's liability to Contractor "A."

17. Architects rarely consent to consolidated arbitration. It is usually to the advantage of an Architect to force the Owner either to choose to pursue only the Contractor, or to conduct two separate arbitrations. The AIA defends this provision by claiming that arbitrators, unlike judges, may not be competent to

handle complex multi-party disputes and may become confused between the negligence standard applicable to design services and the strict liability that attaches to the contractor's breach of warranty. Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137 (1994).

18. On most AAA construction arbitration panels, contractors, architects and their attorneys are better represented than owners and their attorneys. The make-up of the AAA arbitration panels, as well as their tendency to render compromise awards, generally favors the Contractor and Architect at the expense of the Owner. *See* Thomson, *supra* n. 17 at 165.

Chapter 4

SELECTING AND CONTRACTING WITH CONSTRUCTION MANAGERS

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As school construction projects become more complex, the competing issues of time, cost and quality give rise to the need for a board of education (the board) to have an independent party working on its behalf administering the contract for construction and managing the work to be completed; this party is usually the construction manager (CM). The increasing presence of CMs on school construction projects compels the school attorney to familiarize himself with the issues particular to selecting and contracting with a CM. This chapter focuses on (1) the basic roles and functions of CMs, (2) the process of awarding a contract to a CM and (3) negotiating the CM agreement where the CM acts solely as an advisor to the board.

NATURE OF THE CM ARRANGEMENT

The CM is one of several professional consultants who may be on a construction project at any given time. The role of the CM developed due to the lack of efficient management and coordination between design professionals and contractors with respect to costs, construction techniques, quality control and the like.[1] Construction management grew in popularity as

1. JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 363 (West Pub. 5th ed., 1994).

an efficient method for obtaining high quality construction at a lower cost and in a quicker manner.[2]

There are several different types of construction management arrangements available to a board depending upon the type of project that is undertaken and the role the CM is to play. Thus, as an initial matter, the board must determine what type of professional services it requires from the CM.

CM as an Advisor

This relationship is the quintessential independent professional services contract. Although the CM's exact authority may vary, generally the CM has no financial authority or responsibility under the terms of its agreement with the owner. Instead the CM undertakes contractual obligations to supervise, coordinate and inspect the trade contractors' work.[3] In performing these functions, the CM does so as an agent to the owner throughout the term of the project independent from both the architect and the trade contractors.

In this arrangement, the owner bids out the work and holds a contract with a general contractor or several contracts directly with the individual trade contractors. As such, the CM is not in contractual privity with the trade contractors, and, thus, generally not responsible for the acts or omissions of the trade contractors.

CM as an Agent

In this situation, the services provided by the CM are substantially similar to those provided when acting solely as an advisor, except that the CM actually steps into the owner's shoes as its agent and contracts with the architect and the general contractor and/or trade contractors on the owners' behalf. Due to statutory bidding requirements applicable to general and/or trade contracts in many states, however, this type of arrangement is uncommon on school projects. (For more information about bidding, see L. Slutzky, *School Construction Bidding Issues, infra,* at 147.) Nevertheless, should a board wish to pursue this option, one method to reduce the risk of violating competitive bidding laws is to structure the transaction so that the owner bids out the trade contracts and subsequently assigns them to the CM. Upon assignment of the trade contracts to the CM, the CM becomes responsible for the acts and omissions of the contractors which, in turn, should increase the CM's interest in ensuring that the project is completed properly.

CM as a Constructor

Like a general contractor, the CM acting as a constructor contracts with the trade contractors, but also becomes involved in the project at an earlier stage to participate in design and cost setting. In this type of role, it is common, although not necessary, for the CM to have a fixed price project arrangement. In this particular role, the CM assumes the responsibility for the construction of the project and the risk of a fixed cost or a guaranteed maximum price (also known as a GMP contract). At least one state has enacted a statute that specifically allows the award of this type of contract outside of the normal statutory bidding requirements, and several others have passed legislation exempting similar CM arrangements.[4] As discussed above, however, in those states where the trade contracts must be bid, it is possible this transaction may be structured

2. *Id.* at 363-64.

3. Jon M. Wilson et al., *Rights and Limitations of Construction Managers, in* FLORIDA CONSTRUCTION LAW AND PRACTICE § 4.3 (The Florida Bar 1999).

4. IDAHO CODE § 67-2320 (1998); ALA. CODE § 39-2-2(d) (1997); ARK. CODE § 19-11-801 (1995); GA. CODE § 52-2-35 (1945).

so that the owner bids out the trades and subsequently assigns them to the CM. Regardless of the manner in which the CM ultimately holds the trade contracts, its role in this model is to serve as both an advisor and a general contractor. Thus, although this model may provide cost benefits to the owner, it may carry inherent conflicts of interest on the part of the CM

AWARD OF THE CM AGREEMENT

Once the board has determined the role that the CM will play in the construction process, the next step is to award the CM contract. Because the CM may provide professional services and act as a general contractor, courts have struggled with the issue of whether a board may select a CM without public bidding. State law may be dispostive on this issue depending upon the specific role of the CM (advisor only or advisor/contractor) and should be carefully reviewed. In the event state law does not provide a specific exemption allowing for the award of CM contracts without a public bid, the attorney for the board should consider the possibility of awarding the contract as a professional services contract, a common category of exemption from bidding requirements.

A few state legislatures have recognized this exemption specifically. Both South Carolina and Idaho have enacted statutes requiring the licensure of CMs due to the professional nature of their services,[5] and Delaware's state procurement statute recognizes CM services as professional services.[6] Further, the majority of courts that have addressed the issue have concluded that CM contracts, where the CM acts solely as an advisor, constitute contracts for professional services and are not subject to competitive bidding statutes by virtue of an exemption provision.[7]

"COURTS HAVE STRUGGLED WITH THE ISSUE OF WHETHER A BOARD MAY SELECT A CM WITHOUT PUBLIC BIDDING. STATE LAW MAY BE DISPOSTIVE ON THIS ISSUE DEPENDING UPON THE SPECIFIC ROLE OF THE CM AND SHOULD BE CAREFULLY REVIEWED."

For example, in *D-1 Constructors v. Unified School District No. 229*,[8] the Kansas appellate court held that the state statute requiring sealed bids for school construction projects involving amounts greater than $10,000 did not apply to the school district's award of a construction management services contract. In that case, the school district had entered into an AIA "Standard Form of Agreement Between Owner and Construction Manager."[9] Several general contractors brought suit alleging a violation of the state bidding statute; the court, however, disagreed. In holding the contract exempt from the bidding mandates, the court stated that construction

5. S.C. CODE ANN. § 40-11-320 (Law. Co-Op. 1998); IDAHO CODE § 54-4503 (1998). The Idaho statute requires licensure of construction management services on public construction projects, and defines such services to include "representation of an owner in public works construction . . . by a person with substantial discretion and authority to plan, including scheduling, estimating and approval, coordinate, manage or direct phases of a project." IDAHO CODE § 54-4503 (1998).

6. Due to the relationship of the CM to an owner, the substantive discretion assumed by a CM in managing a project, and the necessary skill and experience or training in the field, construction management services constitute professional services "for individuals possessing a high degree of professional skill where the ability or fitness of the individual plays an important part," and are thus arguably exempt from the competitive bidding requirements." DEL. CODE ANN. tit. 29, § 6902 (1953).

7. McMaster Construction v. Board of Regents of Oklahoma Colleges, 934 P.2d 335 (Okla. 1997) (citations omitted).

8. 788 P.2d 289 (Kan. Ct. of App. 1990).

9. *Id.* at 290.

management duties involved detailed construction plans, schedules and analyses.[10] The court further noted that the CM was required to establish bidding qualifications, to solicit bids, and to make recommendations for the award of contracts or the rejection of bids, while the construction manager itself was not allowed to bid.[11] Thus, the CM services were managerial services exempt from the state bidding requirements under a managerial service exception.[12]

In addition to state laws and courts recognizing CM services as professional in nature, several trade organizations adopt this view as well. The American Institute of Architects (AIA) recognizes CM services as professional services distinct from construction contractor services, as evidenced by the separate form of agreement the AIA has developed for CM services.

One should be cautious, however, when assuming that the CM agreement will fall within a professional services exemption for bidding. As the CM performs more contractor services under an agreement, it may become increasingly difficult to convince a court that the CM's services are indeed distinct from those of the traditional general contractor. As one court addressing this particular issue stated: "[c]hanging from hardhat as a general contractor, to a fedora as a construction manager, certainly cannot be construed as an elevation of one's level of skill while at the same time exempting one from competitive bidding and not the other. [*sic*]"[13] The ensuing discussion in this chapter, will address contractual provisions to ameliorate concerns such as those raised by this court. Nevertheless, one should be aware that, as the CM's role as a constructor increases, the distinction between general contractor and CM narrows, possibly requiring compliance with competitive bidding statutes.

10. *Id.*

11. *Id.*

12. *Id.* at 291. *See also* Attlin Construction v. Muncie Community Sch., 413 N.E.2d 281 (Ind. Ct. App. 1980) (construction manager contract utilizes professional engineering skills and experience, and thus, exempt from competitive bidding); *McMaster, supra*, note 7 (contracts between university and construction management service were for personal service and called for professional judgment, and, thus, not subject to competitive bidding).

13. Shively v. Belleville Township High Sch. Dist. No. 201, No. 99-CH-875 (20th Jud. Cir., St. Clair County, Illinois, Feb. 22, 2000) (appeal pending).

NEGOTIATING THE CM AGREEMENT

Once the owner has determined what role the CM will play in the construction process and has selected the CM entity, the owner and CM must memorialize this agreement in written form. The parties to a CM agreement may either draft an original agreement unique to the situation at hand or use a standard form of agreement prepared by a third party. Several trade associations have prepared standard forms for use with a CM. The most common standard forms in use are those prepared by the AIA, the Associated General Contractors and the Construction Management Association of America.[14] This chapter analyzes the 1992 AIA Document B801/CMa, Standard Form of Agreement Between the Owner and Construction Manager, Where the Construction Manager is Not a Contractor (B801), which is commonly used when the CM acts solely as an advisor. The concepts discussed here, however, can be carried over to any form of agreement.

When addressing any standard form of agreement, one must bear in mind the organization that has prepared the agreement and the interests that it represents. By understanding the interests of the organization that prepared the standard agreement, the school board attorney negotiating the CM contract will be better prepared to

14. Wilson, *supra*, note 3 at § 4.6.

make the necessary modifications to reflect the best interests of the Owner.

STRUCTURE OF B801

Article 1. Construction Manager's Responsibilities

Article 2. Scope of Construction Manager's Basic Services

Article 3. Additional Services

Article 4. Owner's Responsibilities

Article 5. Construction Cost

Article 6. Construction Support Activities

Article 7. Ownership and Use of Architect's Drawings, Specifications and Other Documents

Article 8. Arbitration

Article 9. Termination, Suspension or Abandonment

Article 10. Miscellaneous Provisions

Article 11. Insurance

Article 12. Payments to the Construction Manager

Article 13. Basis of Compensation

Article 14. Other Conditions or Services

Depending on the size and nature of the construction project to be completed, certain articles of the agreement may require more modification than others. This chapter suggests revisions that may be incorporated into any CM agreement regardless of the scope of the project. As an initial matter, when amending the B801, one should take note to determine if the modifications made in a particular paragraph will affect another paragraph of the agreement. The B801 has many paragraphs and articles that are cross-referenced, and care should be taken to coordinate changes throughout the document and to ensure that a modification in one paragraph or article does not adversely impact another paragraph or article.

RESPONSIBILITIES OF CM

Article 1 briefly sets forth both the general services the CM is to provide to the Owner and the CM's role in the Project. (A more detailed description of the services to be provided by the CM is described in Article 2.) Because school construction projects often require specialized knowledge in building codes, building materials and a heightened awareness of timelines, it is wise to insert language addressing these requirements. Insertion of this language serves to define clearly both the board's reasoning and intent in hiring the CM and the level and quality of service the board expects to receive. The addition of this type of language also gives the school board attorney an additional concept to present to a court when arguing that the CM was required to perform under a heightened level of care and further distinguishes the role of the CM from that of the contractor. A sample paragraph is as follows:

SUGGESTED ADDITION:

1.1.5 The Construction Manager has been engaged to provide professional construction management services because of its character, expertise, experience and qualifications in dealing with education projects of similar scope. The Construction Manager shall exercise skill and care consistent with the expertise, experience and qualifications of construction management professionals necessary for the successful performance of this educational project.

In addition to the above additional language, it is also advisable to insert a paragraph clearly articulating that the CM is providing professional services to the board. Such a paragraph serves two purposes. First, it addresses the issues discussed earlier in this chapter pertaining to exemptions from statutory bidding requirements and the professional nature of the services provided by the CM. Second, and perhaps more importantly, it raises the standard of care that the CM must exercise on the project. Clearly, the purposes behind the insertion of such language are closely related. Should a court reject the professional nature of the services provided by the CM and require its services to be bid, the enforceability of such a paragraph may be jeopardized. Nevertheless, it is advisable to insert a provision of this nature. When drafting such a provision the attorney for the board should enumerate the CM's professional services, emphasize the CM's professional judgment, authority and fiduciary duties. An example of this type of provision is below:

Another important issue to consider when drafting a professional services paragraph, is minimizing the ability of the CM to perform services that are similar in nature to those of a general contractor. Thus, one may wish to insert language prohibiting the CM from acting as a general contractor and/or from bidding on the trade contracts.

BASIC SERVICES

Article 2 of the B801 addresses the CM's basic services. Prior to modifying this article, the owner and its attorney should discuss the basic services the owner expects to receive from the CM. Quite often the owner believes certain services are included as basic services, only to learn once the contract has been signed and construction has started that such services will be pro-

SUGGESTED ADDITION:

1.1.6 PROFESSIONAL SERVICES. Construction Manager shall provide professional construction management services on this project. Such professional services include substantial discretion and authority to plan, schedule, estimate, approve, coordinate, manage and direct phases of the Project, within the parameters of the Contract Documents. Owner hereby finds and Construction Manager hereby represents and concurs that professional construction management services require a high degree of professional skill and experience in the construction management industry, and that Construction Manager possesses such requisite skill and experience to manage a school construction project of this size and type. Construction Manager acknowledges that he will act as agent of Owner, in Owner's best interests, and will have fiduciary duties to Owner with respect to this project. The Construction Manager represents that he is knowledgeable in school construction and shall exercise reasonable care and skill to comply with and to see that all Contractors comply with all applicable federal and state laws as well as rules, regulations and specifications adopted by the State Board of Education and any other agency with authority over the construction or rehabilitation of school facilities.

vided only at an additional cost. Accordingly, one should always consult with the client to ensure that it is fully apprised of the basic services included in the negotiated fee.

Coordination of CM and Architect Services

In addition to determining what services the CM will provide the owner, the school board attorney also should inquire as to what services the architect is providing so as to avoid any gaps or conflicts in services provided by these parties. For example, the attorney for the board must coordinate, between the CM and architect, such issues as lien waiver reviews, preparation and issuance of contractor specifications and due diligence in the bidding process. Negotiating both the CM and architect agreements simultaneously would assist the school attorney in properly coordinating the activities of the parties. (For more information on negotiating with architects, see M. Levin, *Selecting and Contracting with Architects, supra,* at 45.) This frequently is not an option, however, because the school board often retains the architect at a much earlier point in the project. Nevertheless, the school attorney's awareness of such coordination issues will allow him or her to prepare a more concise CM agreement. Once the attorney for the board has a proper understanding of the services to be performed by the CM, the attorney may begin to modify the B801 as necessary.

Accountability for Third Parties

Article 2 allows the CM to engage the services of consultants, engineers or other third parties as the CM requires to assist in performing its duties required under the agreement. Because the owner does not have input into this selection process, unless contractually agreed, the CM should bear the responsibility for the third parties selected, and should be responsible for these parties' acts, omissions and errors. To ensure that the CM is held accountable for the selection of third parties as well as their acts, errors and omissions, modifications to the B801 are required. Although this language may be inserted as a new paragraph in Article 2, the insertion of this language (see box below) at the end of Paragraph 2.1.1 which defines the CM's basic services works quite well.

SUGGESTED ADDITION:

[Retain standard language and insert the following at the end of the paragraph:]

2.1.1 and other services as may be necessary to provide a complete and accurate performance of services. The Construction Manager shall exercise reasonable care, in the event it engages engineers, consultants, subcontractors, agents, employees and/or officers (collectively the "Consultants"), to engage only such persons and entities who possess the experience, skill, knowledge and character necessary to qualify them individually for the particular duties they perform and who shall perform all work in conformity with the standards of reasonable care and skill with respect to professional services they are rendering. Said consultants shall carry professional liability insurance. The Construction Manager assumes responsibility and liability for the acts, errors and omissions of its Consultants.

Bid Assistance

As part of the CM's basic services, the B801 also provides that the CM will assist the owner in obtaining a list of prospective bidders, establish bidding schedules, assist in the issuance of bidding documents to bidders, conduct pre-bid

conferences with prospective bidders, prepare bid analyses and make recommendations for the owner's rejection or acceptance of bids.[15] Because the CM plays an active role in bid preparation and selection, the CM should share the responsibility of complying with applicable bidding codes and regulations. Accordingly, the school attorney should ensure that paragraphs 2.2.17 through 2.2.19 are modified to require the CM to conduct its activities in conformance with the applicable competitive bidding requirements.

Construction Oversight

One of the most important functions of the CM is to oversee the construction process and to ensure satisfactory performance by the contractors. The B801, however, does not require such oversight, but merely requires the CM to "endeavor to obtain satisfactory performance" from the contractors.[16] This limiting language is less than comforting. Clearly, the best scenario is to require the CM to guarantee the performance of the contractors; however, such a requirement of the CM is unlikely to be agreed upon. Therefore, it is most likely that one will only be able to strengthen the obligation of the CM under this paragraph. Thus, this paragraph should be revised to more accurately describe the CM's obligations. One example is as follows:

SUGGESTED ADDITION:

[Retain standard language and add the following at the end of the paragraph:]

2.3.7 The Construction Manager shall observe each of the Contractors to determine if their work complies with their contract with the Owner.

This language is simple and accurately describes the role of the CM. As the project becomes more complex, additional language or perhaps additional paragraphs should be inserted to delineate the role of the CM in conjunction with observing and reviewing the contractors' work.

Ensuring Work Completion

In addition to the CM's obligation to oversee contractor performance, the CM should be required to provide sufficient supervision of the trade contractors so that upon completion of the Project the owner may presume that the work has been completed in accordance with the contract documents. The standard language of the B801, however, again fails to require the CM to provide such services. Instead, the B801 requires the CM to determine generally if the work is being properly performed and to "endeavor" to guard the owner against deficiencies in the work.[17] As with Paragraph 2.3.7, the CM's oversight of the work performed by the contractors is an essential function of the CM's duties. Therefore, such limiting language should be deleted or revised. If this Paragraph is not revised, the owner should be apprised of the issues surrounding the standard language. Most owners believe that they have hired a CM, among other reasons, to ensure proper completion of the work by the contractors. The retention of the standard language does not require the CM to provide this service, however. The owner also should be apprised that, by retaining the current language in the B801, the standard of care the CM will operate under is greatly reduced because the CM is not required to guard against deficiencies

15. American Institute of Architects, Standard Form of Agreement Between Owner and Construction Manager §§ 2.2.17-2.2.19 (1992).

16. *Id.* at § 2.3.7.

17. *Id.* at § 2.3.13.

but merely "to endeavor" to guard against deficiencies, thus potentially rendering suit against the CM for inadequate supervision more difficult.

Ensuring Proper Payment of Contractors

Another significant aspect of the Project the CM oversees is the process of contractor payment. As part of this process, the CM will review and certify amounts due contractors by issuing a certificate of payment to the owner. In performing this function, however, the CM is not required by the agreement to obtain proper lien waivers from the contractor prior to its request for payment. As with any construction project, owners should require lien waivers from contractors prior to payment to avoid the filing of mechanics' liens against public property or public funds. Therefore, counsel for the board should insert a paragraph into the B801 requiring the CM to obtain all appropriate lien waivers as a prerequisite for contractor payment as indicated in the box below.

SUGGESTED ADDITION:

2.3.11.5 When issuing its Certificate of Payment to the Owner, the Construction Manager shall require each contractor and subcontractor to submit completed lien waivers for all work and supplies covered by the Certificate of Payment. Such lien waivers shall have been reviewed and approved by the Construction Manager. Submission of the Certificate of Payment to the Owner by the Construction Manager shall constitute a representation by the Construction Manager that all necessary lien waivers have been executed and delivered by contractors. The Construction Manager shall give the Owner immediate notice of the filing of any lien by a contractor.

ADDITIONAL SERVICES

Article 3 sets forth additional services the CM may provide to the owner at additional cost. As an initial item, many owners' attorneys strike various paragraphs in Article 3 with the intent of eliminating the additional charge for such services and, moreover, including the services as part of the basic services. However, as savvy CM attorneys point out, the mere deletion of an item from Article 3 does not necessarily incorporate it into the basic services provision. A valid argument can be made that without the explicit transfer of the additional service to the basic services article, the simple deletion of a paragraph from Article 3 merely removes that service as an additional service that would otherwise have been available at an additional cost. Thus, if it is the intention of the school attorney to include an item as a basic service, the appropriate provisions in both articles of the contract should be amended to reflect such.

Contingent Additional Services

With the above in mind, the school board attorney negotiating revisions to the additional services article must realize that modification or deletion made here may affect the CM's fee structure. Nevertheless, certain revisions are advisable. For example, paragraph 3.1 allows the CM to provide contingent additional services required due to circumstances beyond the CM's control merely by notifying the owner prior to commencing the services, provided the owner does not subsequently object to the work in

writing. The better approach, however, is to require the CM before providing any additional services to obtain the prior written approval of the owner. Accordingly, the last three sentences of Paragraph 3.1 should be struck, and the following should be inserted in lieu thereof:

SUGGESTED SUBSTITUTION:

[Delete the last three sentences of standard paragraph and insert in lieu thereof:]

3.1 Any additional service for which the Owner is to compensate the Construction Manager must be authorized in writing by the Owner before such additional service is commenced, and an estimate of the cost or a method of determining the cost shall be submitted by the Construction Manager prior to the authority being granted for said service by the Owner.

Evaluating Extensive Claims

Another paragraph that should be modified or deleted is paragraph 3.2.4. This paragraph allows the CM to receive additional fees for "[p]roviding services in evaluating an extensive number of claims submitted by a contractor or others . . ." The elusiveness of the term "extensive" is the impetus to strike this paragraph, which effectively allows a CM to obtain additional fees at its own discretion. The parties, however, may insert a specific number or another standard to render less likely a dispute between the owner and CM as to what each party considers "extensive."

Another option is to back-charge contractors for any costs the owner may incur as a result of a contractor's excess claims. It is best to draft the agreement so that the CM will look to the trade contractor directly for such costs or receive payment only if the back-charged amount is successfully obtained from the contractor. However, if the CM is unwilling to accept such an arrangement, guaranteeing payment to the CM and back-charging the trade contractor against amounts due to the contractor from the owner may be an acceptable alternative.

OWNER'S RESPONSIBILITIES

Article 4 provides the owner's responsibilities under the B801. In general, these obligations should be discussed and reviewed with the owner prior to execution of the agreement so that the owner is aware of its responsibilities.

Architect's Agreement

Paragraph 4.5 requires the owner to retain the services of an architect under the form AIA Document B141/CMa current as of the date of the CM agreement. Please note this language may need to be revised if the parties are using an older version of a standard form of architect agreement. This paragraph further provides that the CM is to be provided with the terms and conditions of that agreement and prohibits the modification of the architect's agreement without the consent of the CM, which consent will not be unreasonably withheld. Although the architect and the CM work in close relation to each other and at times perform similar functions of which both should be apprised, it is neither necessary nor practical to have the CM consent to the revisions to the architect's agreement. Accordingly, this requirement should be removed from Paragraph 4.5. Notice to the CM of any revisions or modifications to the architect's agreement should suffice.

Reliance on Owner Information

As with most professional service contracts, paragraph 4.9 of the B801 attempts to minimize the liability of the CM for performing services based upon information or reports provided by the owner. Because the owner may possess more information than the CM as to certain structural items, locations of hazardous materials and the like, it is not uncommon for the CM to request such information so that it may perform its job more accurately and efficiently. Additionally, it is also not unreasonable for the CM to attempt to limit its liability for reliance on the information provided by the owner. However, the owner has engaged the professional services of the CM because of its expertise in the construction field and the CM should not be able to abdicate its responsibilities under the guise of reliance on the "accuracy and completeness" of information provided by the owner. As such, a happy medium can be achieved by inserting the following into Paragraph 4.9:

SUGGESTED ADDITION:

4.9 [Add at the end:]

unless the Construction Manager has reason to know or believe the information or reports are inaccurate or incomplete.

Owner-Performed Work

Another issue that should be addressed in Article 4 is the limitation that paragraph 4.11 places on owners that perform construction and operations on the project with their own forces. Generally, a school district will not perform work on the project with its own forces during a construction project. However, it is possible that a board may request that certain limited work be performed by qualified school district personnel or award a few small contracts to contractors to reduce construction expenses.

Paragraph 4.11 binds the owner to the same obligations and rights as other contractors when performing work on the project. Clearly, work completed by the owner or its contractors should be done in accordance with the appropriate plans and specifications and in a workmanlike manner, and the owner's failure to do so should not be grounds for CM liability. Nevertheless, when the owner is performing work with its own personnel, as opposed to trade contractors it has hired, it is improper to treat the owner as another contractor. Ultimately, it is the owner's project, and the owner should be able to perform work on the site without being subject to all of the conditions and obligations of a contractor. Therefore, if the owner anticipates performing some work on the project with its own personnel, the last sentence of paragraph 4.11 should be stricken. It becomes more difficult to proffer a valid argument for the aforementioned revision when the board engages the services of an independent trade contractor outside of the CM's supervision, although the language of paragraph 4.11 may be tempered to address coordination issues only.

If the owner contemplates performing a significant amount of work on the project with its own personnel, simply striking the last sentence of paragraph 4.11 may not be sufficient. Specific details should be discussed and procedures agreed so that both the CM and the owner understand their rights and obligations during the construction process and appropriate language should be inserted to address these issues. For example, insurance requirements, storage of supplies and materials, and schedule coordination must all be addressed.

CONSTRUCTION COST, CONSTRUCTION SUPPORT ACTIVITIES AND OWNERSHIP AND USE OF ARCHITECT'S DOCUMENTS

Article 5, Construction Cost, Article 6, Construction Support Activities and Article 7, Ownership and Use of Architect's Drawings, Specifications and Other Documents, are relatively benign articles from an owner's perspective. Modifications to these articles should be done on a project specific basis.

ARBITRATION

Article 8 provides for the arbitration of claims or disputes between the CM and the owner in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association or as otherwise agreed upon by the parties. The issue of allowing school construction disputes to be submitted to binding arbitration has long been a dilemma. Often the reduced costs and speed of resolution are cited in support of arbitration. To obtain cost effectiveness and a quick resolution of the dispute, the traditional rules of discovery are disposed of and the ability to require the participation of necessary parties, such as the architect or contractors, is severely limited if not prohibited. Such limitations may be problematic when the CM points the finger at a contractor, and the owner is unable to join that party to the arbitration process.

For example, in the event a wall collapses and causes damage, the owner may seek to bring claims against the architect for a design defect, the CM for failure to adequately supervise the project and the contractor for improper construction technique. If the owner is required to arbitrate each of these claims separately, the defendant in each action may place the blame on the other parties who are not joined in that arbitration. Thus, it is possible, and at times likely, that all three parties may be found not liable by placing blame elsewhere, while the owner walks away empty-handed. Obviously, one can modify Article 8 to provide for more discovery and the ability to join necessary parties, but, these types of revisions to Article 8 makes the arbitration process more and more like traditional litigation in cost and lessened expediency. As such, it may be more advantageous for the owner simply to strike the entire article and all references to arbitration in the B801 and rely upon the traditional litigation process with or without a mediation prerequisite.

TERMINATION, SUSPENSION OR ABANDONMENT

Article 9 addresses termination, suspension or abandonment under the contract. Paragraph 9.6 entitles the CM, upon termination which is not its fault, to all termination expenses as defined in paragraph 9.7. Paragraph 9.7 broadly defines termination expenses as "those costs directly attributable to termination for which the [CM] is not otherwise compensated." Such an all-encompassing definition may expose the owner to significant fees in the event of a termination. Clearly, the CM is entitled to compensation for the services performed prior to termination, as well as its reimbursable expenses incurred to date; however, entitlement to broadly defined termination fees may be viewed as inappropriate. Unless the CM can provide the attorney for the board with specific termination expenses it believes would be appropriate, the school board attorney should consider revising paragraph 9.6 to eliminate the reference to termination fees and striking paragraph 9.7 in its entirety. If the parties are able to come to agreement as to allowable termination fees, these fees should be specifically articulated in the agreement.

MISCELLANEOUS PROVISIONS

Article 10 is a "catch-all" article, titled Miscellaneous Provisions. As with most contracts, this is the location in which many of the "standard" contract provisions such as governing law, the binding of the parties successors and assigns and other similar provisions are located. Two paragraphs in this article, however, are more than standard contract provisions.

"BECAUSE CONSTRUCTION DEFECTS OFTEN TAKE SEVERAL YEARS TO SURFACE, AGREEING TO LIMIT THE STATUTE OF LIMITATIONS PERIOD MAY PROVE TO BE HARMFUL TO THE OWNER IN THE LONG RUN."

Statute of Limitations

Paragraph 10.3 attempts to limit the applicable statute of limitations period by beginning the limitations period "no later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion, or the date of the issuance of the Final Project Certificate for Payment of acts or failures to act occurring after Substantial Completion." Under state laws it is not uncommon for the limitations period to begin at a much later point, such as the when the owner knew or should have known of the defect.[18] Because construction defects often take several years to surface, agreeing to limit the statute of limitations period may prove to be harmful to the owner in the long run. As such, Paragraph 10.3 should be deleted when it is more restrictive than the applicable statutory limitations period. One valid reason for striking Paragraph 10.3 is that the state statute of limitations expresses the public policy as to the time period in which actions may be pursued, a determination which the owner, as a public body and trustee of public funds, should respect.

Waiver of Subrogation

Another paragraph to note in this article is the waiver of subrogation contained in paragraph 10.4. This paragraph contains broad language stating that both the CM and the owner waive all rights against each other and every other party associated with the project to the extent that the claim is covered by property insurance. Obviously owners' insurance companies abhor these provisions which prohibit their ability to seek contribution from the liable party after payment on a claim. Thus, many insurance companies have attempted to limit the use of such provisions by inserting language into their policies prohibiting the insured from agreeing to waive subrogation and denying coverage on claims where such language is present.

This waiver becomes of increased significance when the owner participates in a risk pool for self-insurance. By retaining the waiver language in the B801, the owner will preclude the risk pool of which it is a member from recovery on a third party liability. Accordingly, it is always prudent to strike this provision as a matter of course. If the CM is adamant on maintaining the language as is, the owner or attorney for the owner should confirm that the language is acceptable with the owner's insurance carrier or risk pool. If the insurance carrier is unwilling to accept the language, the CM must agree to the modification, walk away from the project, or ask to be added as an additional insured to the owner's builder's risk policy, an unpopular choice among insurance agents and risk pool managers. Before the owner agrees to add the CM to its owner's policy, the school attorney should review applicable state law to determine if this option is the legal equivalent to a waiver of subrogation by the owner.

18. *E.g.*, 735 IL. COMP. STAT. 5/13-214 (1993).

INSURANCE

Article 11, titled Insurance, is one of the most important paragraphs of the agreement and is addressed in more detail below under Other Conditions or Services.

PAYMENTS TO CM

Regarding Article 12, Payments to the Construction Manager, the exact nature of these provisions will need to be modified based upon the nature of the agreement particular to the case at hand. The owner and its attorney should review these provisions, in conjunction with Article 13, so that the owner understands the compensation process and the manner in which the CM will bill the owner. Although the general compensation terms may be considered a business judgment which should be left solely to the discretion of the board, the school attorney should be aware of the different methods of CM compensation so as to provide the board with an explanation of the implications of the proposed fee arrangement and comments on fee terms that are out of the ordinary. For example, a CM's fee may be a flat fee or may be based upon a percent of the cost of the project estimate with a final reconciliation at final completion. Presumably, the CM has based its fee on certain assumptions related to the total costs and duration of the project. Parameters should be inserted into the agreement that indicate how the CM's fee will increase or decrease if these assumptions fail to be accurate.

BASIS OF COMPENSATION

Article 13 sets forth the basis of compensation for the CM. The attorney for the board should review this article in detail with the board so that the board is fully apprised of how total compensation is calculated and how additional reimbursable expenses will be calculated. With regard to reimbursable expenses, the B801 allows for the insertion of a multiplier into the contract for these types of expenses. More often than not, the CM will insert a multiplier in excess of 100% of the cost to the CM, asserting that the mark-up is justified due to overhead expenses associated with the reimbursable expense. After some discussion, the CM usually will reduce the multiplier to 100% of cost or close to it. Even if reduction in an upcharge is not achieved, after such discussion the owner will be aware of this issue and an unwelcome surprise upon receipt of the first request for payment will be avoided.

Project Completion

Attention also should be focused on paragraph 13.5.1 which provides a specific time period for the project to be completed. In the event that the project is not completed by the date in this paragraph, through no fault of the CM, the CM's fee incurred after this time will be billed as additional services in accordance with paragraph 13.3.1. As such, the board's attorney should suggest insertion into paragraph 13.5.1 of a time period for completion that takes this fact into consideration. If possible, the latest projected date of final completion, usually at least six months after the scheduled date of substantial completion, should be used to avoid incurring costs at the additional services rate for lingering follow-up work with punchlists and contractor final payment disputes.

Payment Period

Paragraph 13.5.2 provides the manner in which payments will be due and payable to the CM. Because most states have statutory provisions dictating the manner in which school districts must pay their bills, it may be appro-

priate to replace this paragraph with a reference to an applicable statutory provision addressing this issue. Moreover, in some situations, payment provisions may not be altered by the parties to provide a shorter time period for payment than that set forth in the statute.[19] Thus, review of applicable state payment acts is advisable.

Adjustment of Additional Services Fees

One final paragraph to note is 13.5.3. This paragraph is a "back-door" provision allowing the CM to annually adjust the rates and multipliers for its additional services fees. Although such provision would be most likely limited to reasonable increases, granting *carte blanche* to the CM to adjust its additional services rates and multiplier may be disconcerting to an owner. Most likely, the owner has a limited budget within which to operate and has set a figure for which the project must be completed. Allowing this paragraph to stand as is exposes the owner to possible budget overruns if the project calls for more additional services than anticipated and the project spans more than one year. To alleviate this uncertainty, the parties may freeze these fees and multipliers for the duration of the project, place a maximum cap on the amount that the fees and multipliers may be increased in any given year or over the life of the agreement, or tie any adjustments to a fixed index, such as the Consumer Price Index. Regardless of what method is chosen by the parties, it is advisable to modify this language on long projects to restrict the ability of the CM to increase these costs without limitation.

19. *E.g.*, 50 ILL. COMP. STAT. 505/6 (1996).

OTHER CONDITIONS OR SERVICES

Insurance

The final article of B801 provides the opportunity for the parties to insert in paragraph 14.1 the specific insurance amounts that are required by Article 11. Initially, counsel for the board should review Article 11 to ensure that it addresses all of the insurance concerns that may be applicable to the particular project. When inserting insurance minimums, the attorney for the board should consult with the board's insurance agent, risk-pool administrator, or risk management adviser to determine the proper insurance minimums given a particular district's coverage levels and risk exposure. The provision on the following page is an example of the type of paragraph that may be inserted into Paragraph 14.1.

One item noticeably absent from this suggested insurance provision is the requirement that the CM maintain professional liability insurance. While it is best to require the CM to maintain professional liability insurance at a fixed amount for the duration of the project, many CMs do not carry professional liability insurance due to the prohibitive costs associated with such insurance. Accordingly, the attorney for the board should ask the CM whether it maintains professional liability insurance. If the CM does not carry professional liability coverage, the board should be informed of its exposure in the event of a loss attributed to the CM's professional services. If the CM does maintain professional liability coverage, the above paragraph should be modified to reflect such.

Indemnification

Another item that must be inserted into Article 14 is an indemnification provision. When drafting indemnification provisions, owners' attorneys want these provisions to be as broad as possible, extending coverage to the owner to minimize its liability from a host of damages and actions without exceeding the limits imposed by

SUGGESTED ADDITION:

14.1 The Construction Manager shall purchase and maintain liability insurance coverage covering its work on the Project, beginning with the commencement of the performance of services by Construction Manager until the date of final completion of the Construction Manager's services. Such policy shall provide coverage on an occurrence basis in the amount of $x,xxx,xxx. The Construction Manager also shall purchase and maintain such insurance as will protect the Owner and Owner's Agents and the Architect and their agents and employees from and against all claims, damages, losses and expenses including attorney's fees arising out of or resulting from the performance of the Work, provided that such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (2) is caused in whole or in part by any negligent act or omission of the Construction Manager, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party to whom insurance is afforded pursuant to this paragraph. The Owner and Architect shall be named as additional insureds on the Policy. This Policy shall provide coverage in an amount no less than $x,xxx,xxx for aggregate general liability and $x,xxx,xxx for excess liability. The Construction Manager shall ensure that its insurance policy is amended to reflect that the Policy covers all claims, contributions, and indemnifications for which the Construction Manager is responsible under this Agreement and Amendment, rather than just those claims for which the Construction Manager otherwise would be responsible under law in the absence of this Agreement and Amendment.

law or by public policy. With this in mind, one should consider the following items when preparing such a clause:

- Who is indemnifying the owner (the CM, its partners, agents etc)?
- What is the indemnifying party agreeing to do–indemnify, defend and hold harmless? If the indemnifying party is defending the owner, does the owner have the option to select counsel of its choice?
- What types of claims is the owner being indemnified against? Is it a total indemnification against all claims and damages or only against all negligent claims and damages? What types of damages are covered–property, personal injury, sickness, death or all of the above? (State law may prohibit one party from indemnifying another party from its own negligence.[20] Accordingly, review of applicable state law is advised.)
- What happens if the owner is partially responsible for the accident? Does the owner still have total coverage, partial coverage or neither?
- Does state law require or allow the indemnifying party to expressly waive liability defenses based on workers' compensation laws? If so, what type of waiver language is required?[21]

20. *E.g.*, 740 ILL. COMP. STAT. 35/1 (1971).

21. Kotecki v. Cyclops Welding Corp., 585 N.E.2d 1023 (1992); Braye v. Archer Daniels Midland Co., 676 N.E.2d 1295 (1997).

Other Provisions

In addition to the insurance and indemnity provisions, Article 14 can also serve as home for certain provisions that are required by state law. Such provisions may include necessary anti-discrimination or bid-rigging certifications, prevailing wage requirements, and criminal background checks.

CONCLUSION

As school construction projects continue to increase in complexity, the need for CM services on such projects also will increase. Although the CM and the owner should have the same interest in completing the project on time and in accordance with the plans and specifications, the school attorney must ensure that this is so through careful contract negotiation. By preparing a well-drafted contract, the school attorney sets the stage for an amicable working relationship between the board and the CM where each party understands the other's role and the parties work together to achieve completion of the project.

SUGGESTED ADDITION:

14.2 Indemnification. To the fullest extent permitted by applicable law, the Construction Manager and its agents, partners, employees, and consultants (collectively "Indemnitors") shall and do agree to indemnify, protect, defend and hold harmless the Owner, and its respective board members, officers, directors, employees and agents (collectively "Indemnitees") from and against all claims, damages, losses, causes of actions, suits, judgments and expenses, attorneys' fees of any nature, kind or description (collectively "Liabilities") of any person or entity whatsoever arising out of or caused by resulting from the performance of the services under this agreement or Work on the Project, or any part thereof provided as such Liabilities are caused in whole or in part by any negligent act or omission of the Construction Manager, anyone directly or indirectly employed by it or anyone for whose acts it may be liable under contract or statutory or common law, even if it is caused in part by the negligence or omission of any Indemnitee, so long as it is not caused by the sole negligence or willful misconduct of any Indemnitee. Construction Manager agrees to assume the entire liability for all personal injury claims suffered by its own employees allegedly injured on the Project; waives any limitation of liability defense based upon the *Workers' Compensation Act*, court interpretations of said Act or otherwise; and agrees to indemnify, contribute to claims against, and defend Indemnitees from and against all such loss, expense, damage or injury, including reasonable attorneys' fees, that the Indemnitees may sustain as a result of such claims, except to the extent that Illinois law prohibits indemnity for the Indemnitees' own negligence.

Chapter 5

OWNER-CONTROLLED INSURANCE: ALTERNATIVE RISK MANAGEMENT FOR SCHOOL CONSTRUCTION

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GENERAL

The risks associated with any large construction or renovation project can be significant. School districts must take action to control or minimize those risks. Although risks can emanate from a variety of sources, such as something as simple as the contractor's refusal to sign the construction agreement (thereby delaying the project at some cost to the school district), the failure of the contractor to construct the project in accordance with the plans and specifications (thereby causing the school district to incur cost for modifications), or the bankruptcy of the contractor (thereby possibly bringing the project to a halt); the risks addressed in this chapter deal with property damage and personal injury risks.

Simply stated, property damage and personal injury risks are generally dealt with through insurance. Traditionally, owners, including school districts, that engage in any kind of a significant construction or renovation project require the architects and contractors to have certain insurance in place. Indeed, the other chapters in this book dealing with contracts with architects, construction managers and general contractors all discuss the importance of adequate insurance to respond to property damage and personal injury

BENEFITS OF OCIP

The benefits of an OCIP are many. Specific advantages of an OCIP include:

- **Uniformity of coverage.** The OCIP affords coverage for all contractors and subcontractors, with adequate limits selected by the school district.

- **Selection of insurer.** Because the school district is buying the insurance, rather than the contractor, the school district has the ability to select the insurer and can assure the selection of a well qualified insurer.

- **Elimination of coverage disputes.** Because there is only one insurance carrier on the job, an OCIP minimizes the number of disputes among insurance carriers that might otherwise exist. There will be no finger pointing between insurance carriers, for example, of the contractor and of the subcontractor who may each try to argue that an injury is the fault of the other.

- **Elimination of gaps and overlaps.** Because one insurance carrier insures the entire project, underwriters can eliminate duplicate or unnecessary coverages and unforeseen gaps in the coverage.

- **Improved community relations.** An OCIP can improve public relations. When the district purchases the insurance, it has more say in how claims are handled and administered. With fewer insurance companies attempting to point the finger at one another, there are fewer disputes that could cast a negative light on the school district.

- **Reduced subrogation litigation.** Where more than one insurance carrier is involved, as is traditionally the case, subrogation claims are increased. With only one insurer paying all claims, the number of subrogation claims is reduced.

- **Centralization of the insurance function.** With only one insurer, the various insurance functions are centralized, and the number of tasks are reduced. For example, with an OCIP the school district's business manager does not have to obtain and scrutinize insurance certificates from a large number of contractors and subcontractors working on a particular construction project.

claims. The discussions in those chapters represent the traditional and time-honored approaches to the subject. However, there are alternatives which should and must be taken into account because they provide a number of advantages. The alternative discussed in this chapter is sometimes called "wrap-up" insurance or an "owner-controlled" insurance program (OCIP).

OCIPs have existed for many years, primarily in the private sector for large construction projects. However, over the last several years, OCIPs have been used increasingly on public projects and on smaller projects. Indeed, the advantages of an OCIP are so significant that owners have searched for ways to use the concept on small construction and renovation projects.[1]

An OCIP is an insurance program that covers the job-site risk of the owner (school district), construction manager, general contractor, contractors and subcontractors, generally with respect to property damage and personal injury. An OCIP does not shift liabilities or the legal rules in the state pertaining to legal liability. Negligent parties remain responsible for their own actions, subject to insurance protection. The big difference between an OCIP and traditional insurance arrangements is that a single entity, the school district, buys the insurance policies that will respond to all claims as defined in the coverage. More specifically, OCIPs are an alternative insurance purchasing strategy during construction and/or renovation with respect to workers' compensation, general and excess liability, and builders risk liability. The primary advantage of an OCIP is that it improves coverage and claims service at substantially lower costs, resulting in reduced overall construction costs.

When the school district purchases the insurance, the district pays the premium and is solely responsible for insuring the project. A single policy issued in the school district's name provides for general liability, excess liability and builders risk coverages with all contractors and subcontractors named as additional insureds. To satisfy state workers' compensation laws, individual policies are issued for all contractors and appropriate filings are made with the appropriate state agency on behalf of each contractor. Premium savings are generated generally from the elimination of premium redundancy, coverage duplication and contractor markups. Moreover, OCIPs generally include enhanced safety programs on the project, tending to reduce the number of injuries and the costs associated with such claims. Fewer delay claims will be made due to more effective property loss control programs.

When considering whether to use the OCIP approach, state-specific issues must be taken into account. For example, the states generally provide school districts with reimbursement for some or all of the costs of construction or renovation. Before entering upon an OCIP project, the school district should determine whether an OCIP will change any of the rules pertaining to state reimbursement and how the accounting for the premium cost must be undertaken.

BIDDING ISSUES

Straight OCIP

OCIPs also affect the bidding process. Naturally, if the school district provides the insurance, that will affect the bid prices by contractors. There are three basic ways of bidding a project where a school district is interested in an OCIP. One method, perhaps the easiest and the one that contractors like the best, is known as the "straight OCIP" method. Under this method, the bid solicitation states that the school district will provide the insurance and that contractors are to submit their bids taking out all costs for insurance.

1. In Pennsylvania, for example, the Pennsylvania School Boards Association (PSBA) Insurance Trust has created what it refers to as a "rolling wrap-up" which essentially allows small construction and renovation projects to be pooled for purposes of one overall wrap-up program that, aggregating all of the risks, insures hundreds of millions of dollars of new construction and renovation.

NOTICES TO BIDDERS OF OCIP

Straight OCIP

The _____ School District is requesting bids to be made "net of insurance" and will award the contract to the lowest responsible bidder net of insurance, all as more thoroughly described in the contract documents. Under this approach, contractors and subcontractors must remove the cost of insurance from the base bid price. The lowest responsible bidder will be determined on a "net of insurance" basis. In other words, the base bid is to be identified by the contractor excluding any cost or expenses for general liability, workers' compensation, and builders risk insurance. Alternate bids and unit prices are to be set forth excluding costs of such insurance. The owner will select which alternates it desires and will determine the low bidder based upon the bids without insurance being provided by the contractor.

Quote Method

[Same as straight OCIP and add the following:] After the lowest responsible bidder is selected and the contract is awarded, the school district will ask the contractor to provide a quote for the contractor providing the required insurance and the contractor will be required to submit such a quote. The school district reserves the right to accept the quote as submitted by the contractor in accordance with the contract documents.

Deduct Method

The _____ School District may choose to provide the usual insurances on behalf of contractors and subcontractors working on the project. This approach to project insurance is commonly called a wrap-up or owner controlled insurance program (OCIP). See the general conditions for specific information about the OCIP. Contractors and subcontractors must identify and remove the cost of insurance from the base bid price. The related cost of insurance needs to be identified as an add-alternate amount. The add-alternate amount will be added to the base bid amount if the owner elects not to implement an OCIP.

The lowest responsible bidder will be determined on the basis of the owner providing insurance through an OCIP. In other words, the base bid is to be identified by the contractor excluding any costs and expenses for general liability, workers' compensation, and builders risk insurance. Alternate bids and unit prices are also to be set forth excluding costs for such insurance. The school district will select which alternates it desires and will determine the low bidder based upon the bids without insurance. Those determinations, however, will not affect the decision whether any bidder is a "responsible" bidder as contemplated in law.

Based on historical data, the school district expects that the variance between the base bid without insurance and the base bid with insurance will be approximately 3% to 5% for general construction; 2% for plumbing; 2% for heating and ventilating; and 2% for lighting, electrical and wiring. The school district reserves the right to view the insurance costs data of any bidder prior to award to ensure that the school district has been provided with the proper credits with respect to the contractors bids without insurance.

Quote Method

Under, the second method, the "quote" method, contractors are asked to bid "without insurance" on the assumption that the district will purchase an OCIP. However, once the lowest responsible bidder is selected, that contractor is asked to provide a "quote" for insurance. At the same time that the contractor is asked for a "quote" to provide the insurance, the school district obtains a quote for an OCIP from its insurer. The school district can then determine whether to use an OCIP or to have the contractor provide insurance. In most states, this is acceptable because insurance ordinarily does not have to be "bid". However, school districts and their attorneys should ensure that they can purchase insurance in this manner.

Deduct Method

Under the third method of bidding, the "deduct" method, the bidders are advised that the school district may use an OCIP and that the contractors are required to submit bids both "with insurance" and "deducting insurance". After the bids come in, the school district can then determine from its insurer how much premiums for an OCIP would be. It then makes a decision as to whether to use an OCIP or not, taking into account not only the financial savings, but also the other advantages of an OCIP. The disadvantages of this method are several. First, contractors tend not to like bidding in this way, because it dramatically increases the amount of work necessary to submit a bid, particularly if there are a lot of "add alternates" to be bid separately by the contractors. This method of bidding essentially requires the contractor to submit two bids for every part of the work—one bid without insurance and one bid with insurance. Secondly, depending upon state bidding law, it complicates the bidding process. The lowest responsible bidder without insurance may not necessarily be the lowest responsible bidder with insurance. Generally, to overcome this issue, the bid specifications must clearly state how the lowest bidder will be determined. The author recommends determining the lowest bidder based upon the bids submitted "without insurance." Therefore, the award will be made to that particular bidder even if the school district decides to ask the bidder to provide the insurance rather than going with an OCIP.

BID LANGUAGE

Naturally, use of an OCIP requires careful review in structuring of the bidding and contract language.

Notice to Bidders

The first step is to notify bidders that the project will be an OCIP project through the "advertisement for bids". Standard language for advertisement for bids may be used with the additional language shown on page 124 inserted. Depending upon the bid method—i.e., straight OCIP, quote method or deduct method—the additional language in the advertisement for bids will differ.

Instructions to Bidders

The instructions to bidders should also address use of an OCIP. Bid documents furnished to bidders commonly include the AIA Document A701, Instructions to Bidders. In addition to the typical changes that need to be made to that form for individual projects, the provisions shown on pages 126 - 129 should be added.

ADDITIONAL INSTRUCTIONS TO BIDDERS FOR STRAIGHT OCIP

The following should be added to AIA Document A701:

2.1.5 The Base Bid is made without any cost for Workers' Compensation, General Liability, Umbrella/Excess, or Builder's Risk insurance being included.

2.1.6 That it is aware and has been advised that the Contractor is solely responsible for initiating, maintaining and supervising all safety precautions and programs required under its portion of the Work and their Subcontractors' and Sub-subcontractors' Work and that the Contractor shall review, evaluate and take into consideration these requirements when making its Bid.

2.1.7 That it is aware and has been advised that Subcontractors and Sub-subcontractors ought to be given these requirements for bidding purposes so as to ensure consistency and contract adherence.

2.1.8 That it will require each Subcontractor and each Sub-subcontractor, through legally enforceable written Contracts, to meet all of the responsibilities of the Contractor with respect to any portion of the Work performed by any Subcontractor or Sub-subcontractor.

2.1.9 By submitting the Bid, the Contractor is certifying that it has excluded all insurance costs from the Base Bid, Alternates and Unit Prices with respect to those insurance coverages that will be provided because the School District is implementing the OCIP as set forth in the Contract Documents. The Contractor further certifies and represents that the School District may rely on the Contractor's representation that it has removed all such insurance costs from the Base Bid, Alternates and Unit Prices and that the School District is justified in relying upon said representation.

2.1.10 Based on historical data, the School District, expects that the Base Bids, "net of insurance" will be less by approximately 3% to 5% or higher for general construction; 2% for plumbing; 2% for heating and ventilating; and 2% for lighting, electrical and wiring. The Owner reserves the right to view the insurance cost data of any Bidder to ensure that the [School District, Intermediate Unit, Area Vocational-Technical School] has been provided with the proper credits with respect to the Contractor's bids without insurance.

ADDITIONAL INSTRUCTIONS TO BIDDERS FOR DEDUCT METHOD

If the deduct method is used, the following should be added to AIA Document A701:

2.1.5 The Base Bid is made without any cost for Workers' Compensation, General Liability, Umbrella/Excess, or Builder's Risk insurance being included.

2.1.6 The Add-Alternate for the related cost of insurance was calculated taking into account the actual costs of the insurance required of the Contractor by Article 11 of the General Conditions based upon true and accurate figures.

2.1.7 That it is aware and has been advised that the Contractor is solely responsible for initiating, maintaining and supervising all safety precautions and programs required under its portion of the Work and their Subcontractors' and Sub-subcontractors' Work and that the Contractor shall review, evaluate and take into consideration these requirements when making its Bid.

2.1.8 That it is aware and has been advised that Subcontractors and Sub-subcontractors ought to be given these requirements for bidding purposes so as to ensure consistency and Contract adherence.

2.1.9 That it will require each Subcontractor and each Sub-subcontractor, through legally enforceable written Contracts, to meet all of the responsibilities of the Contractor with respect to any portion of the Work performed by any Subcontractor or Sub-subcontractor.

2.1.10 By submitting the Bid, the Contractor is certifying that it has excluded all insurance costs from the Base Bid with respect to those insurance coverages that will be provided should the School District implement the OCIP as set forth in the General Conditions. The Contractor further certifies and represents that the School District may rely on the Contractor's representation that it has removed all such insurance costs from the Base Bid and that the School District is justified in relying upon said representation.

ADDITIONAL INSTRUCTIONS TO BIDDERS FOR QUOTE METHOD

2.1.5 The Base Bid is made without any cost for Workers' Compensation, General Liability, Umbrella/Excess, or Builder's Risk insurance being included.

2.1.6 When and if the Contract is awarded, the successful Bidder will be notified that it is required to provide to the [School District, Intermediate Unit, Area Vocational-Technical School] a proposal to provide the insurance required by the Contract Documents. The proposal must contain the name and address of the insurance company(ies) that will underwrite the insurance; all costs to the Owner associated with procuring the insurance through the Contractor's insurer; and, upon request, specimen copies of the policies and safety manuals to ensure that the insurance program meets the specifications set forth in the Contract Documents for such insurance. Prior to the commencement of the Work, the Contractor will be notified whether the Contractor will be required to procure the insurance. Whether procured by the Owner or by the Contractor, the insurance will have to be bound before any work commences and the appropriate documents will have to be supplied to the Owner and Contractor providing that the insurance has been bound.

2.1.7 That it is aware and has been advised that the Contractor is solely responsible for initiating, maintaining and supervising all safety precautions and programs required under its portion of the Work and their Subcontractors' and Sub-subcontractors' Work and that the Contractor shall review, evaluate and take into consideration these requirements when making its Bid.

2.1.8 That it is aware and has been advised that Subcontractors and Sub-subcontractors ought to be given these requirements for bidding purposes so as to ensure consistency and Contract adherence.

2.1.9 That it will require each Subcontractor and each Sub-subcontractor, through legally enforce able written Contracts, to meet all of the responsibilities of the Contractor with respect to any portion of the Work performed by any Subcontractor or Sub-subcontractor.

2.1.10 By submitting the Bid, the Contractor is certifying that it has excluded all insurance costs from the Base Bid, Alternates and Unit Prices with respect to those insurance coverages that will be provided should the School District implement the OCIP as set forth in the Contract Documents. The Contractor further certifies and represents that the School District may rely on the Contractor's representation that it has removed all such insurance costs from the Base Bid, Alternates and Unit Prices and that the School District is justified in relying upon said representation.

cont'd

Additional Instructions to Bidders for Quote Method — cont'd

2.1.11 After the Contract is awarded to the lowest responsible bidder on a net of insurance basis, the [School District, Intermediate Unit, Area Vocational-Technical School] will make the decision whether to utilize an Owner Controlled Insurance Program (OCIP) or contractor provided insurance. In order to make this decision, promptly after an award is made, the Owner will solicit proposals for insurance (i.e., OCIP) and will also require the successful Contractor to whom the construction contract has been awarded to provide an insurance proposal that meets the terms and conditions set forth in the Contract Documents. The Contractor will not be permitted to commence work without providing the insurance proposal, unless the requirement is waived in writing by the Owner. Upon consideration of the OCIP insurance proposal and the Contractor's insurance proposal, a decision will be made as to which kind of insurance will be obtained.

Based on historical data, the [School District, Intermediate Unit, Area Vocational-Technical School] expects that the Base Bids, "net of insurance" will be less by approximately 3% to 5% or higher for general construction; 2% for plumbing; 2% for heating and ventilating; and 2% for lighting, electrical and wiring. The Owner reserves the right to view the insurance cost data of any bidder to ensure that the [School District, Intermediate Unit, Area Vocational-Technical School] has been provided with the proper credits with respect to the Contractor's Bids without insurance.

CONTRACT LANGUAGE

With respect to the actual contract language, the following is a detailed analysis of the particular provisions of AIA document A201-1997 affected by an OCIP program.

Cost of Labor

Paragraph 3.4.1 of the contract provides that "the Contractor shall provide and pay for labor . . . [and] transportation . . ." The cost of labor generally includes the cost of workers' compensation insurance. Where the owner provides the insurance under an OCIP, the contractor should exclude the cost of workers' compensation insurance because it would not have to pay for that element of the labor for the work. Therefore, where the public school entity provides wrap-up insurance, Paragraph 3.4.1 should be modified as follows:

SUGGESTED SUBSTITUTION

3.4.1 Unless provided in the Contract Documents, the Contractor shall provide and pay for labor (excluding premium for Workers' Compensation and General Liability insurance in the event such insurance is provided by Owner in accordance with the insurance provisions hereinafter), materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and any other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent, and whether or not incorporated or to be incorporated in the Work."

Indemnification

Paragraph 3.18.1 of the General Conditions requires the contractor to indemnify and hold the owner harmless from any and all claims and costs, except those covered by insurance required in connection with the work. Where the public school entity will provide wrap-up insurance, this fact should be reflected in this provision, as follows:

SUGGESTED SUBSTITUTION

3.18.1 To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by insurance supplied by either the Owner, the Contractor, or the Subcontractors as required by Article 11 of this Contract, the Contractor shall indemnify, defend (at Owner's request and through counsel reasonably acceptable to Owner), and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including, but not limited to, attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.1.

[Delete AIA 3.18.2 and substitute:]

3.18.2 The Contractor and each Subcontractor, of whatever tier, hereby certifies to the School District that it complies with all employment related laws and regulations governing employment or collective bargaining agreements, if any. Nothing in the Agreement shall be construed as divesting any Contractor or Subcontractor of its sole and exclusive right to control the means, manner or method of performance of the Work of any Contractor or their employees. Nothing in this Agreement shall be construed in a manner that would be violative of the legal or contractual rights of any employee. The Contractor, and each Subcontractor, regardless of tier, shall defend, hold harmless and indemnify the Owner against and from any and all claims, demands, suits, actions, costs and expenses including reasonable attorneys' fees, growing out of any claims by an employee or independent contractor of any Contractor or Subcontractor of any tier alleging the violation of any of the individuals' employment rights, whether legal, constitutional or contractual in nature. This provision shall be accorded the broadest meaning.

Notice of Injury or Damage

Paragraph 4.3.8 of the General Conditions requires notices to be provided in the event of personal injury or property damage. Where the public school entity provides wrap-up insurance, injuries or damage that may be covered by this insurance should be properly and promptly reported. Where the public school entity will be providing wrap-up insurance, Paragraph 4.3.8 should be changed by adding the following sentence to the end of the paragraph:

SUGGESTED ADDITION

4.3.8 * * * To the extent that the Owner provides insurance in accordance with Article 11 of this Contract, any Claim involving third parties or Workers' Compensation shall be reported in accordance with the Project Insurance Manual procedures as set forth in Article 11 and the applicable Insuring Agreement.

Subcontractors

It is expected that the prime contractors who are awarded contracts will use subcontractors to perform part of the work. Because those subcontractors will be covered by the wrap-up insurance, provisions need to be included in the General Conditions ensuring that the owner is properly and timely advised of the Subcontractors who will be performing work. In that regard, paragraph 5.2.1 should be changed to provide as follows:

SUGGESTED SUBSTITUTION

5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practical after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. In all cases, this notification shall be received in writing no less than Five (5) Days prior to a Subcontractor starting Work. To the extent that the Owner provides insurance in accordance with Article 11 of this Contract, Contractors are responsible for notifying the Program Administrator, [list Administrator's name and contact information], of all Subcontractor Awards at least five (5) days prior to a Subcontractor starting Work. The Architect will promptly reply to a Contractor in writing stating whether or not the Owner or the Architect, after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Owner or Architect to reply promptly shall constitute notice of no reasonable objection.

Change Orders

Change orders are a regular feature of any construction project. Where the public school entity provides wrap-up insurance, it is necessary that the owner obtain the appropriate credit for providing wrap-up insurance with respect to change orders. Therefore, the following paragraph should be added to the General Conditions:

SUGGESTED ADDITION

7.3.10 Each Construction Change Order shall reflect the proper credit of the Owner providing insurance as set forth in Article 11 of this Contract.

No Work Before Insurance

Paragraph 8.2.2 of the General Conditions prohibits work to be performed prior to the effective date of the insurance. Where the public school entity will be providing wrap-up insurance, the structure of the paragraph will have to be changed as follows to reflect the fact that the owner will be obtaining the insurance:

SUGGESTED SUBSTITUTION

8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 of these General Conditions. The date of commencement of the Work will not be changed by the effective date of such insurance. Unless the date of commencement is established by the Contract Documents or a notice to proceed given by the Owner, the Contractor shall notify the Owner in writing not less than five (5) days or other agreed period before commencing the Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

Contract Cost

A principal justification for a public school entity to provide wrap-up insurance is the reduction in the ultimate cost of the project. Naturally, the language in the general conditions relating to the contract cost should reflect the fact that the contractor will be relieved of its need to obtain and pay for insurance. Consequently, where a public school entity provides wrap-up insurance, paragraph 9.1.1 of the general conditions should be changed to provide as follows:

SUGGESTED SUBSTITUTION

9.1.1 The Contract Sum as stated in the Agreement, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents. To the extent that the Owner provides insurance in accordance with Article 11 of this Contract, the Contract Sum shall exclude the Contractors' and Subcontractors' related costs for the insurance being provided in accordance with Article 11.

Withholding Payment

The general conditions contain a number of provisions allowing the owner to withhold payments to which the contractor would otherwise be entitled, usually when the contractor breaches or violates the contract in some fashion. Provisions related to the wrap-up program should be added to the general conditions to allow additional reasons for withholding payments. Where the public school entity provides wrap-up insurance, the following provisions should be added to paragraph 9.5.1 of the general conditions:

SUGGESTED ADDITIONS

9.5.1.8 To the extent that the Owner provides insurance in accordance with Article 11 of this Contract, failure to comply with the Project Insurance Manual procedural requirements including, but not limited to, enrollment, payroll reporting and audit, and claim administration; or

9.5.1.9 Failure to comply with Project Safety Requirements as set forth in the Project Safety and Health Management Plan.

Insurance Coverage

The issue of the coverage period of insurance is always important. Insurance should cover all work of the contractor and subcontractors, regardless of whether the work is performed before or after "substantial completion." The "substantial completion" language of the general conditions should be modified to make the insurance requirement clear, regardless of whether wrap-up insurance exists. In those cases where there is wrap-up insurance, the following paragraph 9.8.6 should be added to the general conditions:

SUGGESTED ADDITION

9.8.6 To the extent that the Owner provides insurance in accordance with Article 11 of this Contract, coverage under the OCIP for Contractors and enrolled Subcontractors, regardless of tier, shall continue until all items on the Contractor's "list of items to be corrected" have been remedied; provided, however, that if the Contract Documents require a longer period of coverage (i.e. Completed Operations), Owner shall take action necessary to ensure that the longer period of coverage is in place. The OCIP does not extend to Work under any implied or expressed warranty.

Contractor-provided Insurance

Paragraph 9.10.2 of the general conditions contains language pertaining to insurance where the contractor is providing the insurance. Consequently, when the public school entity provides wrap-up insurance, that paragraph needs to be changed to provide as follows:

SUGGESTED SUBSTITUTION

9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner and Owner's property might be responsible or encumbered (less amounts withheld by Owner), have been paid or otherwise satisfied, [AIA standard clauses (2) and (3) deleted] (2) consent of surety, if any, to final payment and (3) if required by Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Contractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

Final Payment

The general conditions contain a number of provisions governing the final payment. Because the OCIP insurer depends upon the contractors and subcontractors to provide certain information relevant to underwriting and the establishment of premiums for the wrap-up insurance, all of the necessary information must be provided by the contractor and subcontractors before final payment is made. To accomplish this objective, the following language is recommended:

SUGGESTED ADDITION

9.10.6 Owner shall not release/make final payment to the Contractor, nor shall the Contractor release/make final payment to any Subcontractor unless required payroll audits have been successfully completed and the insurer has certified that the Contractor and Subcontractors have supplied and/or made records and information available to the insurer as required by Paragraph 11.1.9 of this Contract and that audits have been successfully completed.

Safety

Safety is an important aspect of any construction project, regardless of the type of insurance. Because the safety provisions contained in the general conditions are not adequate, article 10 of the general conditions should be rewritten. Where wrap-up insurance is to be provided, the language contained in the Project Safety and Health Management Plan should be reflected in Article 10.

Insurance

Article 11 of the general conditions pertains to insurance. The insurance provisions in the unedited AIA documents call for the contractor to provide the requisite insurances. However, where the public school entity will be providing the insurance, article 11 should be completely redrafted to allow for the wrap-up insurance. The recommended language for Article 11 of the General Conditions is set forth on pages 138 - 145 in the recommended rider that follows.

Approach to Revisions

Although it is perfectly permissible to produce a totally revised agreement incorporating the various suggestions noted above, the author suggests marking on the face of the AIA standard form of agreement those paragraphs that are being amended or deleted and attaching to the standard form a rider setting forth the deletions, amendments and additions to the contract. In this way, contractors may readily see which language in the standard form is being changed. A sample rider follows.

RIDER TO STANDARD FORM OF AGREEMENT

AIA Document A201-1997 (General Conditions)

This Rider is attached to and modifies the Standard Form of Agreement executed by the parties the ___ day of _____, 20__. The provisions of this Rider supersede and, where applicable, supplant the corresponding numbered provisions of the Standard Form of Agreement to which it is appended. All terms in this Rider have the same definitions as provided in the Standard Form of Agreement to which it is appended.

3.4.1 DELETE AND SUBSTITUTE WITH THE FOLLOWING:

3.4.1 Unless provided in the Contract Documents, the Contractor shall provide and pay for labor (excluding premium for Workers' Compensation and General Liability insurance in the event such insurance is provided by the Owner in accordance with the insurance provisions hereinafter), materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execu-

tion and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

3.18.1 DELETE AND SUBSTITUTE WITH THE FOLLOWING:

3.18.1 To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by insurance supplied by either the Owner, the Contractor, or the Subcontractors as required by Article 11 of this Contract, the Contractor shall indemnify, defend (at Owner's request and through counsel reasonably acceptable to Owner), and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including, but not limited to, attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.1.

3.18.2 DELETE AND SUBSTITUTE WITH THE FOLLOWING:

3.18.2 The Contractor and each Subcontractor, of whatever tier, hereby certifies to the School District that it complies with all employment related laws and regulations governing employment or collective bargaining agreements, if any. Nothing in this Agreement shall be construed as divesting any Contractor or Subcontractor of its sole and exclusive right to control the means, manner or method of performance of the Work of any Contractor or their employees. Nothing in this Agreement shall be construed in a manner that would be violative of the legal or contractual rights of any employee. The Contractor, and each Subcontractor, regardless of tier, shall defend, hold harmless and indemnify the Owner against and from any and claims, demands, suits, actions, costs and expenses, including reasonable attorneys' fees, growing out of any claims by an employee or independent contractor of any Contractor or Subcontractor of any tier alleging the violation of any of the individuals' employment rights, whether legal, constitutional or contractual in nature. This provision shall be accorded the broadest meaning.

4.3.8 ADD THE FOLLOWING TO PARAGRAPH 4.3.8 OF THE AGREEMENT:

4.3.8 * * * To the extent that the Owner provides insurance in accordance with Article 11 of this Contract, any Claim involving third parties or Workers' Compensation shall be reported in accordance with the Project Insurance Manual procedures as set forth in Article 11 and the applicable Insuring Agreement.

5.2.1 DELETE AND SUBSTITUTE WITH THE FOLLOWING:

5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practical after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. In all cases, this notification shall be received in writing no less than Five (5) Days prior to a Subcontractor starting Work. To the extent that the Owner provides insurance in accordance with Article 11 of this Contract, Contractors are responsible for notifying the Program Administrator, [list Administrator's name and contact information], of all Subcontractor Awards as least five (5) days prior to a Subcontractor starting Work. The Architect will promptly reply to a Contractor in writing stating whether or not the Owner or the Architect, after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Owner or Architect to reply promptly shall constitute notice of no reasonable objection.

7.3.10 ADD THE FOLLOWING TO PARAGRAPH 7.3 OF THE AGREEMENT:

7.3.10 Each Construction Change Order shall reflect the proper credit of the Owner providing insurance as set forth in Article 11 of this Contract.

8.2.2 DELETE AND SUBSTITUTE WITH THE FOLLOWING:

8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 of these General Conditions. The date of commencement of the Work will not be changed by the effective date of such insurance. Unless the date of commencement is established by the Contract Documents or a notice to proceed given by the Owner, the Contractor shall notify the Owner in writing not less that five (5) days or other agreed period before commencing the Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

9.1.1 DELETE AND SUBSTITUTE WITH THE FOLLOWING:

9.1.1 The Contract Sum as stated in the Agreement, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents. To the extent that the Owner provides insurance in accordance with Article 11 of this Contract, the Contract Sum shall exclude the Contractors' and Subcontractors' related costs for the insurance being provided in accordance with Article 11.

9.5.1.8 AND **9.5.1.9**

ADD THE FOLLOWING TO PARAGRAPH 9.5.1 OF THE AGREEMENT:

9.5.1.8 To the extent that the Owner provides insurance in accordance with Article 11 of this Contract, failure to comply with the Project Insurance Manual

procedural requirements including, but not limited to, enrollment, payroll reporting and audit, and claim administration; or

9.5.1.9 Failure to comply with Project Safety Requirements as set forth in the Project Safety and Health Management Plan

9.8.6 ADD THE FOLLOWING TO PARAGRAPH 9.8 OF THE AGREEMENT:

9.8.6 To the extent that the Owner provides insurance in accordance with Article 11 of this Contract, coverage under the OCIP for Contractors and enrolled Subcontractors, regardless of tier, shall continue until all items on the Subcontractor's "list of items to be corrected" have been remedied; provided, however, that if the Contract Documents require a longer period of coverage (i.e. Completed Operations), Owner shall take action necessary to ensure that the longer period of coverage is in place. The OCIP does not extend to Work under any implied or expressed warranty.

9.10.2 DELETE AND SUBSTITUTE WITH THE FOLLOWING:

9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner and Owner's property might be responsible or encumbered (less amounts withheld by Owner), have been paid or otherwise satisfied, (2) consent of surety, if any, to final payment and (3) if required by Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Contractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

9.10.6 ADD THE FOLLOWING TO PARAGRAPH 9.10 OF THE AGREEMENT:

9.10.6 Owner shall not release/make final payment to the Contractor, nor shall the Contractor release/make final payment to any Subcontractor unless required payroll audits have been successfully completed and the insurer has certified that the Contractor and Subcontractors have supplied and/or made records and information available to the insurer as required by Paragraph 11.1.9 of this Contract and that audits have been successfully completed.

10.1 THROUGH **10.2.7**

DELETE AND REPLACE WITH PROJECT SAFETY AND HEALTH MANAGEMENT PLAN, WHEN OCIP IS IMPLEMENTED BY OWNER.

11.1 THROUGH **11.4**

DELETE AND SUBSTITUTE WITH THE FOLLOWING:

11.1 Insurance Provided by Owner

11.1.1 Except as otherwise provided in this Contract, prior to issuance of the Notice to Proceed under this Contract, Owner shall, at its sole cost and expense, secure and hereafter maintain insurance of the type and in the limits set forth below. To the extent that the Contractor, Subcontractor, or the property of such persons or entities, are covered by such insurance, (i) the Contractor shall comply and shall require its Subcontractors to comply with the terms set forth in this Paragraph 11.1 and with the most current version of the Project Insurance Manual issued and maintained by the Owner and (ii) the Contractor shall exclude, and shall require its Subcontractors to exclude, the cost and expense of maintaining duplicative insurance coverage in the Cost of Work.

11.1.2 Except as otherwise specified in this Contract, Owner shall purchase and continuously maintain until Final Acceptance or termination of this Contract, whichever occurs first, Builder's Risk Insurance naming as Insured, the Owner, Contractor, and Subcontractors performing Work at the Project Site. Such insurance shall cover all equipment, machinery, supplies and other property intended to be permanently incorporated in the Project, for which title or risk of loss shall have passed at the time of loss to an Insured. Coverage shall apply to such property while it is located at the Project Site or located at temporary off-site storage or staging areas approved by the Owner and/or its representatives, or while in land-based transit to the Project Site and within the continental United States. Coverage shall be written on an "All-Risk" form, including but not limited to, fire, lightning, windstorm, hail, riot, riot attending a strike, civil commotion, aircraft, vehicle, smoke, explosion, vandalism, malicious mischief, damage to glass, theft, flood and earthquake (including sinkhole) coverages, subject to normal industry policy provisions, limitations, deductibles and exclusions. Limits under this insurance shall not be less than One Hundred Per Cent (100%) of the Replacement Value of the Project for physical damage to property and related expenses, provided that sub-limits shall be established for losses due to flood, which earthquake and flood sub-limits shall be no less that the minimum sub-limits for such losses established pursuant to Owner's agreements with lenders.

11.1.3 Contractor, Subcontractor or Sub-subcontractor, as applicable, shall be responsible to pay the Builder's Risk policy deductible to the extent any one of them is responsible for the loss. This deductible, as stated in the OCIP manual, shall not be included in the Contract Price.

11.1.4 Exclusions from such Builder's Risk insurance may include, but are not limited to, the following: (i) loss resulting from mysterious disappearance or caused by any wrongful removal of any property of a Named Insured or any Additional Insured by the employee(s) of such Named Insured or Additional Insured; (ii) loss or damage to any automobiles; (iii) loss or damage to Contractor's or any Insured Subcontractor's owned, leased or rented property or

construction but not intended to be permanently incorporated in the Project; and (iv) loss or damage covered by manufacturer's warranty or guarantee.

11.1.5 Loss, if any, under this Builder's Risk insurance shall be adjusted with Owner, Lenders, and/or Trustees, with the cooperation of Contractor and Subcontractors. Insurance proceed checks shall be made payable to the Owner or its Lenders or Trustees. Amounts shall be disbursed, when and if appropriate, to the Contractor or Subcontractors through the Change Order procedures described in this Contract.

11.1.6 Except as otherwise specified in this Contract, the Owner shall maintain an Owner Controlled Insurance Program, referred to herein as OCIP, with Owner, Contractor and Subcontractors of all tiers, and such other persons or interests as the Owner may designate, as Insured parties, with limits not less than those specified below for each coverage. The OCIP coverage shall not apply to vendors, suppliers, material dealers or other subcontractors who are solely engaged in the stocking, testing, transporting, picking up, delivering or carrying materials, parts, equipment or any other items or persons to or from the Project Site; to Contractors and Subcontractors who furnish material worked to a special design in accordance with the Drawings and Specifications but who perform no operations at the Project Site, unless required by Owner in writing; or to non-trade employees who are temporarily at the Project Site for meetings, deliveries or similar activities. OCIP coverage for any Contractor or Subcontractor requires the written determination of enrollment of the applicable Contractor or Subcontractor by Owner. Owner may, in its sole discretion, and at any time prior to or during the performance of Work by a Contractor or Subcontractor, elect not to enroll or to cease an enrollment of the Contractor or Subcontractor of any tier.

11.1.6.1 Workers' Compensation insurance for statutory benefit limits under Pennsylvania Workers' Compensation law, and Coverage B – Employer's Liability with minimum limits of One Million Dollars ($1,000,000) Each Accident for Bodily Injury by Accident, One Million Dollars ($1,000,000) Each Employee for Bodily Injury by Disease, and One Million Dollars ($1,000,000) Policy Limit for Bodily Injury by Disease. Such insurance shall be endorsed to include Longshore and Harbor Workers Compensation Act Coverage and Jones Act Coverage, if applicable. The policy shall be endorsed to include "Other States Coverage." Coverage will apply only to Work performed at the Project Site and to incidental off-site activities directly related to Work performed at the Project Site. Coverage is not provided for off-site Work.

11.1.6.2 Commercial General Liability insurance, written on an Occurrence form shall be no less comprehensive and no more restrictive than the coverage provided by the standard Insurance Services Office (ISO) form CG 00 01 (10/93). Such insurance shall include by its terms or appropriate endorsements Bodily Injury, Property Damage, Personal Injury, Blanket Contractual, Independent Contractors, and Products and Completed Operations (for Five (5) Years upon completion and written acceptance for each Project). Coverage shall include the perils of "x" (explosion), "c" (collapse) and "u" (underground) exposures. This coverage

shall have a minimum limit of One Million Dollars ($1,000,000) Each Occurrence, Two Million Dollars ($2,000,000) General Aggregate per School District per Year, and Two Million Dollars ($2,000,000) Products/Completed Operations Aggregate per School District. Coverage will apply only to Work performed at the Project Site. Such insurance will not include coverage for products liability to any insured party, subcontractor, vendor, supplier, material dealer or others for any product(s) manufactured, assembled or otherwise worked upon away from the Project Site.

11.1.6.3 Umbrella Liability Insurance. Except as otherwise specified in this Contract, insurance coverages as described in this Paragraph 11.1.6.3 follow form with the liability coverages specified in Paragraphs 11.1.6.1 and 11.1.6.2 of this Contract and will be provided by the Owner through the OCIP. The Umbrella Liability program is Fifty Million Dollars ($50,000,000) per Occurrence and Fifty Million Dollars ($50,000,000) Annual Aggregate per School District.

11.1.6.4 The coverage described in Paragraphs 11.1.6.1, 11.1.6.2 and 11.1.6.3 are set forth in full in their respective policy forms, and the foregoing descriptions of such policies are not intended to be complete, or to alter or amend any provisions of the actual policies. In matters, if any, in which this description may conflict with such policies, the provisions of the policies shall govern.

11.1.7 Prior to doing any of their work, each Contractor and Subcontractor must complete an Enrollment Application in accordance with the most current version of the Project Insurance Manual.

11.1.8 Change Orders. To the extent that the Owner is providing the coverages described in Paragraphs 11.1.6.1, 11.1.6.2 and 11.1.6.3, the adjustment of the Contract Sum as contemplated in Paragraph 7.3 and its sub-paragraphs shall be calculated and determined net of the insurance cost. Premiums shall be based on all wages, subject to legal limitations, including wages paid to the employees of the Contractor or any Subcontractor of any tier, money paid to or on behalf of individuals who are treated as or referred to as "independent contractors" (or any other similar term), but who are legally employees; and money paid to any individual or entity for or on behalf of so-called leased temporary or day laborers.

11.1.9 The Contractor and Subcontractors shall provide and/or make available for audit any and all records reasonably needed by the Owner and/or its insured(s) to calculate the premium properly that is to be paid by the Owner, as applicable. The Contractor and Subcontractors shall keep and maintain, in a professional manner, sufficient records as may be needed to properly calculate insurance premiums for all insurance that the Owner will provide under the terms of this Contract.

11.2 Right of Owner to Cancel Insurance

11.2.1 Owner reserves the right to terminate or modify the coverages identified in Paragraphs 11.1.6.1, 11.1.6.2 and 11.1.6.3 on

Sixty (60) Calendar Days written notice to Contractor and Subcontractors of all tiers. To the extent that any coverage identified in Paragraphs 11.1.6.1, 11.1.6.2 and 11.1.6.3 is so terminated or modified, or if and when Owner determines not to enroll or cease enrollment of a Contractor or Subcontractor of any tier in any of such coverages, then Contractor shall maintain or amend, and shall require its affected Subcontractors to maintain, its own policies of insurance as required in Paragraph 11.3 of this Contract and its subparagraphs to include coverage for all operations not included or no longer included in the coverage to be furnished by the Owner pursuant to Paragraph 11.1 and its subparagraphs. The actual cost of such alternative insurance will be reimbursed by Owner as a Change Order with the Contract Price or the pro-rata portion thereof, amended accordingly. Alternate Bids and Unit Prices will be adjusted in a similar fashion. Upon request, written evidence of such alternative insurance shall be provided to the Owner prior to the actual date of the termination or modification of the Owner-furnished insurance coverage, or promptly after Owner's determination of non-enrollment of a Contractor or Subcontractor in any such coverage.

11.3 Contractor and Subcontractor Provided Insurance. The Contractor shall provide the following insurances and, upon request, supply proof of the following insurances to the Owner or its designee.

11.3.1 Automobile Liability insurance covering all owned, non-owner, and hired vehicles used by Contractor and Subcontractors for all operations both on and off the Project Site, with a minimum limit of One Million Dollars ($1,000,000) Combined Single Limit Per Accident for Bodily Injury and Property Damage.

11.3.2 Professional Liability insurance if Contractor (or applicable Subcontractors) will perform or retain others to perform professional services in connection with the Work, including engineering, architectural, medical, testing, environmental assessment or remediation, or design-build services, with a minimum limit of One Million Dollars ($1,000,000) Per Wrongful Act, Error, or Omission, and a minimum Two Million Dollars ($2,000,000) Annual Aggregate Limit.

11.3.3 Owned and Non-Owned Aircraft. If an aircraft, whether owned or non-owned by the Contractor or any Subcontractor, is used in connection with the Work by the Contractor or any Subcontractor of any tier, the Contractor or Subcontractor, as applicable, shall advise the Owner or its representatives, shall provide a written explanation of the planned use of the aircraft, and shall provide Aircraft Liability Insurance at its sole cost and expense, the conditions and limits to be established by the Owner. The Owner reserves the right to prohibit the use of any aircraft in connection with the Work under this Contract. The minimum limit will be Five Million Dollars ($5,000,000). This insurance shall be primary to all other insurance.

11.3.4 Asbestos and/or Lead Abatement. Asbestos and/or Lead Abatement Liability Insurance with limits of Ten Million Dollars ($10,000,000) Each Occurrence and Ten Million Dollars ($10,000,000) Aggregate when Work includes asbestos and/or lead abatement activities.

11.3.5 Contractor shall provide Commercial General Liability insurance with minimum limits of Five Million Dollars ($5,000,000) Each Occurrence; Five Million Dollars ($5,000,000) General Aggregate and Five Million Dollars ($5,000,000) Products/Completed Operations Aggregate that will respond in excess over any and all collectible Commercial General Liability, Umbrella or Excess coverage provided by the Owner under Paragraphs 11.1.6.2 and 11.1.6.3. This coverage is primarily for off-site activities and differences in conditions.

11.3.6 Contractor Provided Insurance, if OCIP is cancelled or Contractor is not enrolled in OCIP. Within seven (7) days of being notified that the Owner has elected to cancel OCIP in accordance with paragraph 11.2, or exclude a Contractor in accordance with paragraph 11.1.6, Contractor shall submit a quote or proposal in writing to provide Workers' Compensation and General Liability insurance that meets the terms and conditions of the Contract Documents.

11.3.6.1 In the event that the Owner exercises its right to cancel the OCIP or exclude a Contractor, the Contractor shall then supply insurance for both on-site and off-site Work prior to the continuation of Work. The following provisions shall apply:

11.3.6.1.1 Contractor shall provide, pay for and maintain (and shall require Subcontractors of all tiers to provide, pay for and maintain) insurance of the type and limits set forth below. Such insurance shall be maintained in full force and effect from the end date of the OCIP or commencement of the Work by Contractor, whichever is earlier, and until final acceptance of the entire Project or the completion of all post-acceptance warranty or related Work by Contractor, whichever is later, and shall be for both on-site and off-site Work.

11.3.6.1.2 Automobile Liability insurance covering all owned, non-owned, and hired vehicles used by Contractor and Subcontractors for all operations both on and off the Project Site, with a minimum limit of One Million Dollars ($1,000,000) Combined Single Limit Per Accident for Bodily Injury and Property Damage.

11.3.6.1.3 Professional Liability insurance if Contractor (or applicable Subcontractors) will perform or retain others to perform professional services in connection with the Work, including engineering, architectural, medical, testing, environmental assessment or remediation, or design-build services, with a minimum limit of One Million Dollars ($1,000,000) Per Wrongful Act, Error, or Omission, and a minimum Two Million Dollars ($2,000,000) Annual Aggregate Limit.

11.3.6.1.4 Owned and Non-Owned Aircraft. If an aircraft, whether owned or non-owned by the Contractor or any Subcontractor, is used in connection with the Work by the Contractor or any Subcontractor of any tier, the Contractor or Subcontractor, as applicable, shall advise the Owner or its representatives, shall provide a written explanation of the planned use of the aircraft, and shall provide Aircraft Liability Insurance at its sole cost and expense, the conditions and limits

to be established by the Owner. The Owner reserves the right to prohibit the use of any aircraft in connection with the Work under this Contract. The minimum limit will be Five Million Dollars ($5,000,000). This insurance shall be primary to all other insurance.

11.3.6.1.5 Asbestos and/or Lead Abatement. Asbestos and/or Lead Abatement Liability Insurance with limits of Ten Million Dollars ($10,000,000) Each Occurrence and Ten Million Dollars ($10,000,000) Aggregate when Work includes asbestos and/or lead abatement activities.

11.3.6.1.6 Workers' Compensation insurance providing statutory benefit limits under Pennsylvania's Workers' Compensation law and minimum limits under Coverage Part B (Employer's Liability) of Five Hundred Thousand Dollars ($500,000) for Each Accident for Bodily Injury by Accident, Five Hundred Thousand Dollars ($500,000) Each Employee for Bodily Injury by Disease, and Five Hundred Thousand Dollars ($500,000) Policy Limit for Bodily Injury by Disease. The insurance shall cover all operations of Contractor (or the applicable Subcontractor). Such insurance shall be endorsed to include "Other States Coverage".

11.3.6.1.7 Commercial General Liability insurance covering all Operations/Work of Contractor (or the applicable Subcontractor). Such insurance shall be written on an Occurrence form. Coverage shall not be provided under a "Claims-Made" or "Modified Occurrence" policy without the prior, expressed written consent of Owner. Such insurance: (i) shall be no less comprehensive and no more restrictive than the coverage provided by the standard Insurance Services Office (ISO) form CG 00 01 (10/93); (ii) shall include by its terms or appropriate endorsements Bodily Injury, Property Damage, Personal Injury, Blanket Contractual, Independent Contractors, Products and Completed Operations coverages; (iii) shall include Products Liability coverage for any products manufactured, assembled, or otherwise worked upon away from the Project Site; and (iv) shall include coverage for "x" (explosion), "c" (collapse), and "u" (underground) exposures. Such insurance shall have the following minimum limits:

For the Contractor:

$5,000,000 Each Occurrence;

$5,000,000 General Aggregate per Project; and

$5,000,000 Products/Completed Operations Aggregate per Project;

For all Subcontractors:

$1,000,000 Each Occurrence;

$2,000,000 General Aggregate per Project; and

$1,000,000 Products/Com
pleted Aggregate per Project;

11.3.6.1.8 The Owner, the Architect and its Consultants and the Construction Manager shall be named as Additional Insureds on the insurance policies described in Paragraphs 11.3.6.1.2, 11.3.6.1.3, 11.3.6.1.4, 11.3.6.1.5 and 11.3.6.1.7. Coverage afforded to the Owner, the Architect and its Consultants and the Construction Manager as Additional Insureds under said policies shall

be primary to any insurance carried by Owner, the Architect and its Consultants and/or the Construction Manager;

11.4 General Provisions Relating to Insurance

11.4.1 All insurance required by this Contract shall be from insurance companies authorized to transact that class of insurance in the Commonwealth of Pennsylvania and having a minimum rating of (or equivalent to) A-VIII by A.M. Best & Company. When required, certificates must be personally and manually signed by the authorized representative of the insurance company shown on the certificate with proof that he/she is an authorized representative thereof. In addition, certified, true and exact copies of all insurance policies required by this Contract shall be provided within a reasonable period of time upon written request.

11.4.2 All of the insurance provided by the Contractor, Subcontractors and Owner under the terms of this Contract shall provide primary coverage with respect to the Work. Any other insurance maintained by Owner, Contractor, or Subcontractor shall be in excess of this insurance and shall not contribute to it.

11.4.3 Thirty (30) Calendar Days written notice shall be given to the Owner and Contractor of any cancellation, intent not to renew, or reduction in the policies' coverage except in the application of the Aggregate Limit Provisions.

11.4.4 The insurance coverages and limits required under this Contract are designed to meet the minimum requirements of the Owner. They are not designed as a recommended insurance program for the Contractor or its Subcontractor; and meeting these requirements does not relieve such persons or entities of their obligations under any other Paragraph of this Contract.

11.4.5 The amounts and types of insurance required by the Contract shall conform to the minimum requirements set forth in this Article 11, utilizing Insurance Services Office (ISO) policies and endorsements where applicable.

11.4.6 All of the insurance required by this Article 11 shall be issued as required by law and shall be endorsed, where necessary, to comply with the minimum requirements contained herein.

11.4.7 Owner may elect at any time during the term of this Contract to require Contractor to procure and maintain other or additional insurance. Notice of such election shall be given at least Sixty (60) Days prior to the effective date of the required modifications. Any additional costs incurred by the Contractor or Subcontractors in securing said other or additional insurance shall be reimbursed by the Owner as part of the Cost of the Work, and the Contract Price shall be revised by Change Order to be increased by the amount of such additional cost.

11.4.8 Owner and Contractor waive all rights against (i) each other and the Subcontractors, agents, and employees of each other and (ii) Subcontractors, agents and employees, for damages caused by fire or other peril to the extent covered by the

Builder's Risk insurance obtained pursuant to Paragraph 11.1.2 hereof, Commercial General Liability insurance obtained pursuant to Paragraph 11.1.6.2 hereof, or Umbrella Liability insurance obtained pursuant to Paragraph 11.1.6.3 hereof; except such rights as each may have to proceeds of such insurance held by any party to this Agreement or by any Subcontractor. The insurance policies obtained by Owner pursuant to this Article 11 shall include a waiver of subrogation in favor of the Contractor and Subcontractors and the insurance policies obtained by Contractor or Subcontractors pursuant to this Article 11 shall include a waiver of subrogation in favor of the Owner. Without limiting the generality of the foregoing, it is specifically agreed that there is and shall be no waiver of subrogation by Owner or Owner's other Property and Casualty insurer(s) for claims, damages, or losses of whatever nature or type that are insured by any insurance obtained either by the Owner, the Contractor, or any Subcontractor of any tier pursuant to any of the provisions of this Agreement. In all events, any insurance obtained by the Owner, Contractor or any Subcontractor of any tier pursuant to this Agreement shall be primary and the policies possessed by Owner, Contractor or any Subcontractor of any tier for purposes of fulfilling the insurance obligations under this Agreement shall be written as primary.

11.4.9 The Owner, the Architect and its Consultants, the Construction Manager, and the PSBA Insurance Trust shall be named as Additional Insureds on the insurance policies described in Paragraphs 11.3.1, 11.3.2, 11.3.3, 11.3.4, and 11.3.5. Coverage afforded to the Owner, the Architect and its Consultants, the Construction Manager, and the PSBA Insurance Trust as Additional Insureds under said policies shall be primary to any insurance carried by Owner, the Architect and its Consultants, the Construction Manager, and/or PSBA Insurance Trust;

11.5 All provisions pertaining to Performance and Payment Bonds should be included as desired.

Chapter 6 SCHOOL CONSTRUCTION BIDDING ISSUES

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School construction is a large and growing sector of public construction. For example, in the year 2000, the annual expenditure on school construction projects was $47.8 billion. Total public construction for that year was $188.5 billion.[1] For every public school construction project, plans were prepared, bids were issued, and a contract was publicly let. Each bid submittal contained the potential seeds of disaster. A bid protest by an unsuccessful bidder, an injunction by a taxpayer, a claim of bid mistake—each contain the potential to delay the project, causing an increase in costs and more importantly a loss of effective use of needed classroom space.

This chapter outlines the salient critical legal bidding issues and is designed to give the practitioner the necessary insights to anticipate and avoid construction disasters. The bidding process is a patchwork of diverse state statutes and regulations interpreted by courts. The challenge is to create a framework of understanding of the critical construction and bidding issues to counsel the public school client. This understanding will enable school districts to embark upon a construction project without challenge and the consequential delay to the project.

1. ENGINEERING NEWS RECORD, November 27, 2000, at 49.

PUBLIC CONTRACTS—AUTHORITY AND CONDITIONS PRECEDENT TO CONTRACT

Power to Contract

Enabling legislation establishes the power of the governmental entity to contract and the methodology of awarding contracts. For example, Illinois has never adopted a uniform acquisition statute. Many have been legislatively proposed but never approved. Illinois has more than 25 different statutes applicable to public bidding.

Each governmental entity in Illinois has its own unique authority to contract.[2] A careful review of the school district's or municipality's power and contracting methodology is essential to avoid a claim of *ultra vires* and a void contract.[3] The enumerated statutory duties are representative of the diversity of the conditions precedent necessary for Illinois public bodies to bid and award contracts. Other states may have similar statutory requirements. This summary should *not* be considered a definitive analysis of the subject. Indeed, each home rule unit may promulgate its own procedures for acquisition of goods and services. Hence, review of board bidding policies is essential for a complete understanding of the bidding procedures and standards applicable to the particular school district.

Authority to Act—Reliance on Express, Implied and Apparent Authority

Individuals who deal with public entities are charged with a duty of ascertaining the scope of the authority of the persons with whom they deal.[4] One who deals with a governmental body must be sure that those who purport to act for that body stay within the bounds of their authority.[5] Implied or apparent authority is insufficient to justify relying upon the representations of a public officer or employee. Express authority is necessary to bind the public entity.[6]

When the power of a board or public officer is limited to a prescribed method of contracting, the mode prescribed becomes the measure of power. If the prescribed mode is disregarded, the contract is void and unenforceable. "One who deals with a public officer stands charged presumptively with a full knowledge of that officer's powers

2. State of Illinois: 30 ILL. COMP. STAT. 505/1 *et seq.* The following administrative rules apply to the Illinois Purchasing Act: Department of Central Management Services—ILL. ADMIN. CODE tit. 44 § 1.100 *et seq.*, § 500.100 *et seq;* Auditor General—ILL. ADMIN. CODE tit. 44, § 500 *et seq;* Joint Rules of the Board of Regents, the Board of Governors of State Colleges and Universities, the Board of Trustees of the University of Illinois, and the Board of Trustees of Southern Illinois University—ILL. ADMIN. CODE tit. 44, § 550 *et seq;* Environmental Protection Agency—ILL. ADMIN. CODE tit. 44, § 550 *et seq;* Department of Mines and Minerals—ILL. ADMIN. CODE tit. 44, § 600 *et seq;* Department of Transportation—ILL. ADMIN. CODE tit. 44, § 625 *et seq;* Department of Human Rights—ILL. ADMIN. CODE tit. 44, § 750 *et seq;* Capital Development Board—ILL. ADMIN. CODE tit. 44, § 910 *et seq;* Abandoned Mined Lands Reclamation Council—ILL. ADMIN. CODE tit. 44, § 1150 *et seq;* Illinois State Toll Highway Authority—ILL. ADMIN. CODE tit. 44, § 1200 *et seq.*

   Counties: 55 ILL. COMP. STAT. 5/5-1022; 65 ILL. COMP. STAT. 5/5-36006.

   Cities and Villages: 65 ILL. COMP. STAT. 5/8-9-1 *et seq.*; 65 ILL. COMP. STAT. 5/8-10-1 *et seq.*; 65 ILL. COMP. STAT. 5/9-2-100.

   Community Colleges: 110 ILL. COMP. STAT. 1015/19.

   School Districts: 105 ILL. COMP. STAT. 5/10-20.21; 5/35-10.

   Park Districts: 70 ILL. COMP. STAT. 1205/8-1(c); 75 ILL. COMP. STAT. 10/40-45.

   Public Building Commissions: 50 ILL. COMP. STAT. 20/20.

   Library Districts: 75 ILL. COMP. STAT. 5/5-5.

   Drainage Districts: 70 ILL. COMP. STAT. 605/6-1.

3. Mathew v. Town of Algonquin, 279 N.E.2d 91 (Ill. App. 1972).

4. DeKam v. City of Streator, 146 N.E. 550 (Ill. 1925).

5. D.C. Consulting Engineers v. Batavia Park Dist., 492 N.E.2d 1000 (Ill. App. 1986).

6. *See* FDIC v. Providence College, 115 F.3d 136 (2d Cir. 1997).

and is bound at his peril to ascertain the extent of his power to bind the government of which he is an officer, and any act of an officer to be valid must find express authority in law or be necessarily incidental to a power expressly granted."[7]

Prior Appropriation

The public entity must proceed in the manner prescribed by law.[8] Most governmental entities in Illinois must as a condition precedent to the award of a contract adopt a budget and appropriate the sums of money necessary to pay for the expenses and liabilities during the fiscal year. Boards of education in cities of more than 500,000 in population must, as a condition precedent to entering into a contract, adopt a budget and appropriate the sums necessary to pay for the expenses and liabilities.[9] In Illinois school districts with less than 500,000 in population need not adopt a prior appropriation as a condition precedent to entering into a contract.

Ratification

A voidable contract may be ratified.[10] A void contract may not be ratified.[11] A contract is void if the public entity lacks authority or the contract is specifically prohibited by law. Ratification does not require formal action. It can be inferred from the knowing acceptance of the benefits of the contract.[12]

THE DUTY TO PUBLICLY BID

"STATUTES REQUIRING COMPETITIVE BIDDING ESTABLISH THRESHOLD MONETARY AMOUNTS WHICH TRIGGER THE BIDDING REQUIREMENT."

In the absence of a statute requiring it, competitive bidding is not required for a public body to enter into a valid contract.[13] Public bidding is not a common law requirement. Statutes requiring competitive bidding establish threshold monetary amounts which trigger the bidding requirement. These statutes typically establish a very explicit list of exemptions from the bidding process. However, Illinois governmental entities have widely different authority. It is imperative that those dealing with a particular public entity verify the scope of the public entity's authority.

Threshold Monetary Amounts

- **Contracts for Repair, Maintenance, Remodeling, Renovation or Construction**

Each local governmental entity has a minimum threshold which, if exceeded, must be publicly bid unless it falls within one of the enumerated exemptions. Many statutes recognize the cost and expense required to publicly bid a project. Governmental entities may usually enter into minor repair, maintenance, remodeling renovation or construction projects which do not involve a change or increase in the size, type or extent of the existing facility. In these cases, the

7. Bear River Sand & Gravel v. County of Placer, 258 P.2d 543, 546 (Cal. App. 1953).
8. East Peoria Waterworks Improvement Project v. Board of Trustees of Community College, 433 N.E.2d 726 (Ill. App. 1982).
9. 105 ILL. COMP. STAT. 5/34-49.
10. City of Shawneetown v. Baker, 85 Ill. 563 (1877).
11. DeKam v. City of Streator, 146 N.E. 550 (Ill. 1925).
12. Great Lakes Dredge & Dock v. City of Chicago, 188 N.E. 196 (Ill. 1933). *But see*, D.C. Consulting Engineers v. Batavia Park Dist., 492 N.E.2d 1000 (Ill. App. 1986). *See* 65 ILL. COMP. STAT. 5/8-10-21.
13. People ex rel. Adamowski v. Daley, 159 N.E.2d 18, 20 (Ill. App. 1959).

threshold limit for public bidding is expanded. For example, under Illinois law community colleges may enter into such contracts up to $15,000.[14] School districts have authority to enter into contracts up to $20,000.[15] The State has authority to enter into such construction contracts in an amount not to exceed $25,000.[16]

- **Bid Splitting**

For public officials faced with publicly bidding a project, it is often tempting to split the project in order to avoid the difficult and time consuming task. This conduct may be expressly prohibited.[17] Where it is not expressly prohibited, it may be considered inimical to the principles of public bidding and may constitute a void and unenforceable contract. It may also subject the public official who ignores the prohibition to official misconduct proceedings.

Exempt Transactions

The legislature may exempt specific transactions from the bidding process. A public entity's reliance on the aggregate of the exemptions or a general exemption to justify its decision not to competitively bid a specific acquisition has been rejected. The court in *Smith v. Intergovernmental Solid Waste Disposal Ass'n* stated, "[h]ad the legislature intended that result it would have so stated, and it certainly could have, as shown by the exceptions to the competitive-bidding statutes. . . ."[18]

POSSIBLE EXEMPT TRANSACTIONS

- ➢ Professionals (Construction Managers, Architects, Engineers, Surveyors)
- ➢ Design-Build
- ➢ Requests for Proposals
- ➢ Emergencies
- ➢ Change Orders
- ➢ Contracts Not Adapted to Competitive Bidding
- ➢ Work by School Personnel

➢ Professionals

a. Construction Managers

Construction managers have been considered professionals and exempt from public bidding requirements.[19] However, one Illinois Circuit Court opinion rejected the notion that construction managers are professionals, exempt from the bidding requirements. In the words of the trial court judge:

> Although the defendants, have claimed that the services of Korte possess a high degree of skill, nothing introduced by the parties would warrant a finding of any expertise above that of a general contractor. . . [C]hanging the name of the delivery system or the illusory division of responsibilities during design and construction phases [does not] make the general contractor's knowl-

14. 110 ILL. COMP. STAT. 805/3-27.1.

15. 105 ILL. COMP. STAT. 5/10-20.21.

16. 30 ILL. COMP. STAT. 505/6(a)(7). *But see*, 30 ILL. COMP. STAT. 500/30-15(a).

17. "Except to emergency contracts authorized by Section 8-10-5, no undertaking involving amounts in excess of $10,000 shall be split into parts by the requisitioning offices or otherwise, so as to produce amounts of $10,000 or less for the purpose of avoiding the provisions of this Division 10." 65 ILL. COMP. STAT. 5/8-10-6. *See also*, 70 ILL. COMP. STAT. 345/24. 30 ILL. COMP. STAT. 500/20-20(a).

18. 605 N.E.2d 654, 665 (Ill. App. 1992).

19. McMaster Construction v. Board of Regents of Oklahoma Colleges, 934 P.2d 335 (Okla. 1997) (Construction management service contracts as professional services need not be publicly bid under state competitive bidding law.).

> edge and advice any greater or more professionally skillful when he calls himself a construction manager. Changing from a hard hat as a general contractor, to a fedora as a construction manager, certainly cannot be construed as an elevation of one's level of skill while at the same time exempting one from competitive bidding and not the other.[20]

Notwithstanding this opinon, the vast majority of courts nationwide have recognized construction managers as professionals, exempt from the public bidding process.[21] (For more information on contracting with construction managers, see H. Brickman and J. Levi, *Selecting and Contracting with Construction Managers, supra* at 103.)

b. Architects, engineers, surveyors

Architects, engineers and surveyors must be selected in accordance with the appropriate statute.[22] These statutes may require publication of a request for submittals of qualifications preceding the negotiation of a contract.[23] However, inadvertent failure to publish a notice of request for proposals in a newspaper of general circulation will not preclude award of a contract for professional design services where the solicitation is widely distributed by other means.[24] (For more information on contracting with architects, see M. Levin, *Selecting and Contracting with Architects, supra* at 45.)

➢ **Design-Build**

Illinois state and local governments do not have express authority to contract for design-build projects without competitive bidding. Under the existing statutory scheme it is not possible to comply with the public bidding law under a pure design-build project.[25] Many states have specific statutes authorizing requests for proposals for design-build projects. Other states have embraced competitive bidding for design-build projects.[26] (For more information about design-build projects, see S. Segal, *Legal Issues and Practical Implications of Using Design-Build, supra* at 31.)

➢ **Requests for Proposal**

A request for proposal is typically the process of requesting information from offerors concerning a good or service. The request for proposal may not contain the specificity of a formal bid request. A request for proposal may not meet the statutory requirements of publication of notice of bid, precise bid specifications, a public opening, and a public announcement of the competitive bid.[27]

➢ **Emergencies**

In general, a public entity has authority to make emergency expenditures without competitive bidding. In some states the emergency

20. Shively v. Belleville Township High School Dist., 99CH 875 (12th Jud. Cir. St. Clair County, Ill.). The matter is currently on appeal in the Fifth Illinois Judicial District.

21. Malloy v. Boyertown Area School Board, 657 A.2d 915 (Pa. 1995); D-1 Constructors v. United School Dist. No. 229, 788 P.2d 289 (Kan. App. 1990); Attlin Construction v. Muncie Community Schools, 413 N.E.2d 281 (Ind. App. 1980).

22. *See, e.g.*, Local Government Professional Service Selection Act, 50 ILL. COMP. STAT. 510/1 or Architectural, Engineering and Land Surveying Qualifications Based Selection Act, 30 ILL. COMP. STAT. 535/5.

23. *See also*, 70 ILL. COMP. STAT. 3615/4.06 (Special Districts).

24. LeClair v. Town of Norwell, 719 N.E.2d 464 (Mass. 1999) (contract not precluded where 27 firms responded to a solicitation sent by facsimile).

25. *See* Smith v. Intergovernmental Solid Waste Disposal Ass'n, 605 N.E.2d 654, 668 (Ill. App. 1992).

26. Greater Cincinnati Plumbing Contractors' Ass'n v. City of Blue Ash, 666 N.E.2d 654 (Ohio App. 1996), *appeal denied*, 661 N.E.2d 754 (1996).

27. *Smith*, 605 N.E.2d 654, 665-66.

expenditure must be approved by two-thirds of the entire governing board, not simply a majority of a quorum. Sometimes purchasing agents may also be authorized to make emergency expenditures for purposes of safety and welfare up to a certain dollar amount.[28]

➢ **Unforeseen Changes under Existing Contracts—Change Orders**

When an existing contract is in place, unforeseen circumstances may necessitate additional work in excess of certain dollar limits or require extending the contract more than a certain number of days. Such conditions usually do not justify avoiding the requirement of public bidding unless statutory conditions are met. For example, in Illinois the circumstances which necessitate the change in performance must not be reasonably foreseeable at the time the contract was executed. The change must be germane to the original contract as signed. The additional work or increase in contract time must be in the best interest of the public entity. Such changes must be set forth in a change order. The person authorized to approve the change order must certify the existence of these conditions and include the certification in the contract file which is subject to public inspection.[29]

➢ **General Exception**

Many statutes contain an omnibus exception clause such as "contracts which by their nature are not adapted to award by competitive bidding...."[30] However, where bidding statutes do not contain this general exception, but rather have a list of very explicit exceptions, courts have ruled that in the absence of a specific exemption, the contract must be publicly bid.[31]

➢ **Force Account**

A force account is work performed by the public entity's own personnel. Force accounts are generally exempt from public bidding.[32]

GENERAL PRINCIPLES OF PUBLIC BIDDING

Certainty Required

The bid specifications must fulfill two fundamental bidding principles: First, a fair comparison of bids is necessary; and second, to achieve a fair comparison, the specifications must allow each bidder to submit a bid on the same basis. The specifications must be sufficiently detailed so that the kind, quality, and character of work and materials can be determined by one experienced in such matters.[33] Certainty in the bid specifications is indispensable to uniform bids. A nonuniform response means that the specifications are flawed and/or the nonuniform response is nonresponsive. The specifications must be sufficiently detailed to afford the owner upon receipt of the bid submittals to effectively measure whether the bidder is responsive to the bid specification and comparable to the bid submittals of other bidders.

Modifications of the Specifications—Addendum

The owner or its representative should encourage questions and clarifi-

28. *See, e.g.*, 65 ILL. COMP. STAT. 5/8-10-6.

29. 720 ILL. COMP. STAT. 5/33E-9.

30. 55 ILL. COMP. STAT. 5/5-1022; 65 ILL. COMP. STAT. 5/8-10-3; 70 ILL. COMP. STAT. 1205/8-1(c).

31. *See Smith*, 605 N.E.2d 654, 663.

32. Construction Industry Force Account Council v. Amador Water Agency, 84 Cal. Rptr. 2d 139 (Cal. App. 1999); F.R. Inskip v. Board of Trustees of the University of Illinois, 187 N.E.2d 201 (Ill. 1963).

33. Mohr v. City of Chicago, 74 N.E. 1056 (Ill. 1905).

cations of the bid specifications. Ambiguity is the source of conflict and dispute. An ambiguity once identified should be immediately clarified by an addendum issued to all participants in the bid process.

Failure to clarify ambiguities by addendum will result in bidders submitting proposals based upon their definition of the scope of the work. This may mean the owner is evaluating nonresponsive bids. In such circumstances the owner can only arbitrarily award the contract. Any of these three consequences may be cause to set aside the bid award.

Failure to raise a question concerning the interpretation of contract requirements may constitute a waiver of a claim of ambiguity or omission. A contractor who does not seek clarification from the owner may not take advantage of any apparent error or omission in the plans and specifications.[34]

Owner's Warranty of Sufficiency

The owner warrants the adequacy of the specifications.[35] The owner has no recourse if the goods delivered and/or the services received are in conformance with the specifications, but fail. The owner received exactly what he specified and paid for.[36] To avoid failure of goods or services the owner should engage a professional consultant to assist in the preparation of specifications. Should the goods or services supplied not conform to the specifications as intended, the owner may look to the professional for recourse.

THE BIDDING PROCESS

Advertisement

Due advertisement of a public notice in a newspaper of general circulation within the locality of the public entity, a sufficient time before the opening of the bids, is typically a requirement for solicitation of a public bid. However, inadvertent failure to publish a notice of request for proposals in a newspaper of general circulation does not necessarily preclude the award of a contract where the solicitation is advertised widely by other means.[37]

Prequalification

Prequalification is either statutorily authorized[38] or implicit in the power of the governmental entity. Courts seem to afford pre-qualifying bidders latitude in correcting the pre-qualification information.[39] Failure to submit any prequalification data constitutes a nonresponsive bid disqualifying the bidder.[40] Unduly restrictive prequalification requirements may violate the competitive bidding statute.[41]

34. Berra Construction v. Missouri Highway & Transportation Comm., 14 S.W.3d 276 (Mo. App. 2000).

35. United States v. Spearin, 248 U.S. 132 (1918).

36. W.H. Lyman Construction v. Village of Gurnee, 403 N.E.2d 1325, 1331-32 (Ill. App. 1980).

37. *LeClair*, 719 N.E.2d 464.

38. 30 ILL. COMP. STAT. 500/30-15.

39. Tec Electric v. Franklin Lakes Board of Educ., 665 A.2d 803 (N.J. Super. 1995); Palamar Construction v. Township of Pennsauken, 482 A.2d 174 (N.J. Super. 1985).

40. Hawaii Corp. v. Kim, 500 P.2d 1165 (Haw. 1972); Broomes v. City of East Chicago, 342 N.E.2d 893 (Ind. App. 1976); Modern Continental Construction v. City of Lowell, 465 N.E.2d 1173 (Mass. 1984).

41. Construction Contractors' Ass'n of Hudson Valley v. Board of Trustees, 600 N.Y.S.2d 953 (N.Y. App. Div. 1993).

SELECTED PROVISIONS FROM AIA DOCUMENT A701
INSTRUCTIONS TO BIDDERS

4.4.1 A Bid may not be modified, withdrawn or canceled by the Bidder during the stipulated time period following the time and date designated for the receipt of Bids, and each Bidder so agrees in submitting a Bid.

4.4.2 Prior to the time and date designated for receipt of Bids, a Bid submitted may be modified or withdrawn by notice to the party receiving Bids at the place designated for receipt of Bids. Such notice shall be in writing over the signature of the Bidder. Written confirmation over the signature of the Bidder shall be received, and date- and time-stamped by the receiving party on or before the date and time set for receipt of Bids. A change shall be so worded as not to reveal the amount of the original Bid.

4.4.3 Withdrawn Bids may be resubmitted up to the date and time designated for the receipt of Bids provided that they are then fully in conformance with these Instructions to Bidders.

5.2 Rejection of Bids. The Owner shall have the right to reject any or all Bids. A Bid not accompanied by a required bid security or by other data required by the Bidding Documents, or a Bid which is in any way incomplete or irregular is subject to rejection.

5.3.2 The Owner shall have the right to accept Alternates in any order or combination, unless otherwise specifically provided in the Bidding Documents, and to determine the low Bidder on the basis of the sum of the Base Bid and Alternates accepted.

5.5 Opening of the Bids. At the discretion of the Owner, if stipulated in the advertisement or Invitation to Bid, the properly identified Bids received on time will be publicly opened and will be read aloud. An abstract of the Bids will be made available to Bidders.

Source: American Institute of Architects

Bid Submittals

- **Sealed Bid**

State law may require that the bids be "sealed by the bidder" to eliminate the possibility of fraud or favoritism in the expenditure of public funds.

- **Faxed Bid**

State law may allow bids by facsimile. However, in the absence of specific statutory authority, facsimile or other electronically transmitted bids should not be accepted or considered. The 1987 American Institute of Architects' Instructions to Bidders (Document A701) forbids oral, telephonic or telegraphic bids. In 1989 the federal acquisition regulations were amended to specifically allow faxed bids in many situations.[42]

42. 48 C.F.R. § 14.202-7.

- **Timeliness of Bid**

It is the duty of the bidder to submit the bid within the time frame established by the notice to bid and the bid documents and deliver it to the appropriate place.

It is within the discretion of the owner to accept a late bid. In *Statewide Roofing v. Eastern Suffolk Coord. of Cooperative Educational Services*,[43] a low bid was delivered by UPS before bid time to the correct location and addressed to "purchasing officer." However, a custodian signed for the package but delivered it to the wrong office. The bid was discovered *after* bids were publicly opened and read. The purchasing agent confirmed the time of delivery by UPS and then opened the bid. The court held that the "non-public" opening of the bid was not an impediment to an award of the contract.

In *Power Systems Analysis v. City of Bloomer*,[44] the city properly exercised its discretion to accept a bid one and one half hours late where fraud, collusion and favoritism were prevented and the public would receive the best work at the lowest price.

- **Modification, Withdrawal or Resubmittal of Bids Before Bid Opening**

The bid instructions may allow the contractor to withdraw its bid *prior* to opening. Or a bid submittal may constitute an irrevocable offer which may not be withdrawn.[45] Paragraphs 4.4.2 and 4.4.3 of AIA Document A701 allow modification or withdrawal of bids prior to the time and date designated for receipt of bids. A withdrawn bid may be resubmitted. (See box at top of page 154.)

Public Opening and Reading of Bid

Bidders are generally entitled to at least three days notice of the time and place of the bid opening. Illinois law generally requires that a public officer or employee publicly open the bids and publicly announce the contents of the bids.[46] AIA A701 ¶5.5 gives the owner discretion to publicly open and announce all properly identified bids (See box at top of page 154.)

In *Statewide Hi-Way Safety v. New Jersey Dep't of Transportation*,[47] state law required that the bids shall state the "hour, date, and place where the sealed proposals will be received and publicly opened and read." The cost plus contract consisted of two components which had to be determined to ascertain the lowest bid. The agency's failure to total the two components at the bid opening and read it publicly constituted a material deviation from the statutory requirements. The bid award was set aside.

- **Withdrawal or Modification After Bids are Received**

AIA A701 ¶4.4.1 prohibits bidders from modifying, withdrawing, or canceling a bid during a stipulated time period following receipt of bids. (See box at top of page 154.) In *Hemphill Construction v. City of Laurel*,[48] the court said:

> The law requires competitive bids. The purpose of the law is to protect the public by promoting competition so as to prevent fraud, favoritism, and the like. These premises negate any inference that a bid can be amended after opening to substantially increase the bid price, and this is especially so where, as here, the error and the

43. 661 N.Y.S.2d 922 (N.Y. Sup. Ct. 1997).

44. 541 N.W.2d 214 (Wis. App. 1995).

45. Elsinore Union Elementary School Dist. v. Kastoff, 276 P.2d 112, 115 (Cal. App. 1955).

46. 105 ILL. COMP. STAT. 5/10-20.21.

47. 661 A.2d 826 (N.J. Super. 1995).

48. 760 So.2d 720, 724 (Miss. 2000).

intended correct bid are not apparent from the bid document.

Awarding the Bid—Criteria

- **Lowest**

The public interest is the focus of the inquiry.

- **Responsive**

A responsive bid is one which is in strict compliance with the bidding documents. A competitive bid which contains a material variance is an unresponsive bid and may not be corrected *after* the bids are opened in order to make it responsive.[49]

a. Material defects—nonwaivable

A two-pronged test determines whether bid noncompliance constitutes a material and nonwaivable irregularity: First, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements; and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.[50]

A public entity when confronted with a material deviation in the bid submittal has two choices: First, award to the next lowest responsible bidder; or second, reject all bids and readvertise.

Bid Bonds. An inadequate bid bond may be deemed a material defect. In a case where the low bidder's bid bond from a B-rated surety failed to comply with the specified "Best Rating A- or better," a taxpayer challenged the award of the contract to the low bidder despite the B-rated bid bond. The court held that the bidder's failure to provide a proper bond was "not a waivable irregularity, but a material defect." The court in *Gaeta v. Ridley School District*[51] reasoned that a bond from a surety with a B rating is easier to obtain than one with an A- rating; the rating requirement may have discouraged or excluded some bidders from the bidding process to their inability to acquire a bond from a surety with an A- rating or better.

In another case the Army Corps of Engineers awarded a contract to a bidder who initially failed to include a completed bid submittal package. The Corps had allowed a re-submittal six days after the bid opening. The court set aside the award as "irrational." The submittal lacked a commitment to hold the bid open for the requisite period of time and a promise to furnish bonds.[52]

List of Subcontractors. In *Williams Brothers Construction v. Public Building Comm. of Kane County*,[53] an injunction was denied where the unsuccessful bidder failed to show that the successful bidder's failure to list its subcontractors on the bid form was a material and nonwaivable variance from the specifications. The same result was reached in *Ghilotti Construction v. City of Richmond*.[54] There the low bidder, when challenged on whether it would perform not less than 50% of the

49. Leo Michuda & Sons v. Metropolitan Sanitary Dist. of Greater Chicago, 422 N.E.2d 1078, 1082 (Ill. App. 1981).

50. 10 MCQUILLAN, MUNICIPAL CORPORATIONS § 29.65, at 462-463 (3d ed.)

51. 757 A.2d 1011 (Pa. Commw. Ct. 2000). *See also*, Bodine Electric of Champaign v. City of Champaign, 711 N.E.2d 471 (Ill. App. 1999) (Contractor's submittal of a 5% bid bond in lieu of the specified 10% bid bond was a non-waivable material variance.).

52. Firth Construction v. United States, 36 Fed. Cl. 268 (1996).

53. 612 N.E.2d 890 (Ill. App. 1993).

54. 53 Cal. Rptr. 2d 389 (Cal. App. 1996).

contract with its own forces indicated that it could meet the bid requirement without a change to the contract price by buying materials directly rather than through a subcontractor. The bidder was allowed to restructure its bid without altering the price. The city waived the noncompliance and awarded the contract. The court held that the bid substantially conformed to the contract requirements and that the bidder had not been provided an advantage over other bidders.

A different result was reached in *Leo Michuda & Sons, Co. v. Metropolitan Sanitary Dist.* where a failure to list minority and small business subcontractors with the bid submittal was considered a material deviation requiring rejection of the bid. The omission purportedly gave the low bidder an advantage over its competitors. It allowed the low bidder to negotiate with minority subcontractors after it was designated the low bidder.[55] In *Valley Crest Landscape, Inc. v. City Council of the City of Davis*,[56] the court also set aside a contract awarded to a nonresponsible low bidder. The low bidder did not designate what portion of the project it would be performing. The specifications required that the general contractor perform at least 50% of the work with its own forces and designate on the bid documents the percentage of work performed by its subcontractors. Failure to include this data in the bid submittal was considered a material irregularity and could not be waived by the city.

Signatures. The Illinois Appellate Court's conclusion that the failure of the president to include his signature on all but one bid submittal was considered a material deviation was vacated and dismissed for mootness by the Illinois Supreme Court in *George W. Kennedy & Co. v. City of Chicago*.[57] The author believes that the multiple signatures of the president and the bid bond adequately provided security to the public entity of execution and performance of the contract. Inadvertent omission of one signature should be considered an immaterial deviation and waivable.

b. Minor variances—waivable

A variance which neither deprives the public entity of its guarantee that the contract will be performed nor grants the successful bidder an advantage over competitors constitutes merely a technical irregularity that can be waived. Courts have recognized that competitive bidding should be administered in a manner so as not to thwart the primary purpose of achieving economy.

In *Tec Electric v. Franklin Lakes Board of Educ.*,[58] the court suggested that "where the irregularity is not substantial, it may be the duty as well as the right of the municipality to waive it." In *Tec Electric*, the bidder omitted a one page document, entitled, Prequalification Affidavit, which is part of the state's statutory qualification scheme. The affidavit requires the bidder to state that there has been no material adverse change in the qualification information. The ten item bidder check list prepared by the board of education did not list the Prequalification Affidavit as an item. The check list included a determination by the Department of Treasury, Division of Building and Construction that the bidder was qualified as required by New Jersey law. Tec Electric included all of the ten specified items. The prequalification affidavit was to be sent to the Department of the Treasury for a determination of whether a change in status had occurred. Here, the court found that Tec Electric and its surety were financially and contractually committed to the project; the omission did not influence

55. 422 N.E.2d 1078, 1082 (Ill. App. 1981).

56. 49 Cal. Rptr. 2d 184 (Cal. App. 1996).

57. 481 N.E.2d 913, *vacated and dismissed*, 491 N.E.2d 1160 (Ill. App. 1986).

58. 665 A.2d 803 (N.J. Super. 1995).

the amount of any other contractor's bid; there was no evidence of manipulation of the bidding process for competitive advantage. Finally, the court held that refusal to waive the defect was an abuse of discretion.[59]

- **Responsible**

Responsibility is assessed based upon the contractor's past history and technical experience on similarly sized and/or complex projects, its financial and bonding capacity, and the depth and experience of its labor forces and management personnel.

In *Court Street Steak House v. County of Tazewell*,[60] social responsibility was considered an appropriate factor in awarding a food service contract. The court ruled it was reasonable for the county to award the contract based on the bidder's training for the mentally impaired. The dissent accurately suggests that the county should have included social responsibility as a criterion for award of the contract and a clear methodology for measuring responsibility in the bid specifications. Using any factor not previously specified permits manipulation of the award.

The author suggests that public entities follow the recommendation of the dissent.[61] A procuring agency should specify its needs and solicit offers in a manner designed to achieve full and open competition so that all responsible sources are permitted to compete. Restrictive provisions are permissible only to the extent necessary to satisfy the needs of the agency or as otherwise authorized by law.[62]

- **Licensed**

Must a contractor be licensed in order to be considered responsible for award of the contract? In *Thompson Electronics Company v. Easter Owens/ Integrated Systems v. Will County Public Building Comm.*,[63] bids for the Juvenile Justice Center were issued, and a prime contract was awarded to Easter/Owens (an unlicensed contractor) to install the security communications system. Bid specifications did not require the contractor to be a licensed private alarm contractor. A licensed unsuccessful security contractor sought to enjoin the award pursuant to the Private Detective, Private Alarm, Private Security and Locksmith Act[64] which requires "a private alarm contractor" to be licensed to sell and install the system but does not require the contractor to be licensed to bid. The court held that the Commission did not abuse its discretion in awarding the contract to the lowest responsible bidder because the bid specifications did not require the contractor to be licensed at the time the contract was bid.[65]

- **Best Bidder Statutes**

A statute which grants the public entity authority to award the contract to the "lowest and best bidder" vests wide discretion in the public entity. In Illinois the laws are modeled after the requirements of the federal Brooks Act

59. See dissent on waiver of defects in *George W. Kennedy & Co. v. City of Chicago*, 481 N.E.2d 913, 919-20 (Ill. App. 1985).

60. 643 N.E.2d 781 (Ill. 1994).

61. *See also*, 30 ILL. COMP. STAT. 500/45-35 (for sheltered workshops for the severely handicapped).

62. Charles H. Tompkins Co. v. United States, 43 Fed. Cl. 716 (1999); Matter of Construction Contractors Ass'n of Hudson Valley v. Board of Trustees, 600 N.Y.S.2d 953, 956 (N.Y. App. Div. 1993). Federal procurement laws prohibit unduly restrictive specifications. 41 U.S.C § 253(a)(2) and 10 U.S.C. § 2305(a)(1)(B).

63. 702 N.E.2d 1016 (Ill. App. 1998).

64. 225 ILL. COMP. STAT. 446/1 *et seq.*

65. *See also*, Quality Fixtures v. Multi-Purpose Facilities Board, 986 S.W.2d 865 (Ark. 1999). *But see*, M & B Construction v. Yuba County Water Agency, 81 Cal. Rptr. 2d 231 (Cal. App. 1999). (Agency's pre-award exercise of authority to select type of license required of contractors to bid on the project was not an abuse of discretion.).

"THE METHODOLOGY OF AWARDING CONTRACTS WITH ALTERNATIVES SHOULD BE ESTABLISHED IN ADVANCE OF BID OPENING."

which requires federal agencies to base their contract decisions upon "demonstrated competence and qualifications" instead of the lowest responsible bidder.[66] An award when made honestly and in good faith will not be interfered with by the court. The decision, however, must be based upon facts reasonably supporting its decision. The decision must be made in good faith, in the interest of the public, without collusion or fraud, nor corruptly, nor from motives of personal favoritism or ill will. In *Kat Excavation v. City of Belton,* where the public had a history of problems with other contractors and the disparity between the two bidders was $4,600 on a $542,676 contract, the court held that the public entity did not abuse its discretion by choosing the second lowest bidder.[67]

- **Alternate Bids**

Some jurisdictions grant broad discretion in the owner's ability to ask for bids in the alternative and the exercise of reasonable discretion in the selection of the alternatives it desires.[68] Some courts consider such broad, unfettered discretion as an ability to manipulate the alternatives in order to award the contract to the favored contractor.

The methodology of awarding contracts with alternatives should be established in advance of bid opening. Manipulation of alternates could allow dishonesty, favoritism, improvidence, fraud or corruption to occur where the contract is awarded to other than the lowest base contract bidder. An award of contract based strictly on the base contract work was upheld in *Tilden-Gil Constructors v. City of Cathedral City.*[69] A public owner should rank or prioritize and award based upon pre-defined financial ability announced at the time of the bid opening. Alternatively, a blind bidder pool can be established by coding the name of the bidders during determination of the alternatives selected.[70]

AIA A701 provides in ¶5.32 that the owner has the right to accept alternate bids unless otherwise provided in the bidding documents. (See box at top of page 154.)

- **Unbalanced Bids**

An unbalanced bid is a bidding technique often used where unit prices, alternatives or multiple projects are included within the same bid package. It affords the bidder the opportunity to control the circumstances under which it will be awarded the bid. A typical clause provides: "No bid will be accepted which does not contain an adequate or reasonable price for each and every item named in the schedule of quantities."[71]

- **Post-Bid, Pre-Award Negotiations**

Once the bidding process produces a lowest responsible bidder, no supervening public interest or policy consideration precludes negotiating and modifying a post-bid, pre-award price concession from the low bidder. This is so as

66. 40 U.S.C. § 542.

67. 996 S.W.2d 649 (Mo. App. 1999).

68. Acme Bus v. Board of Educ. of Roosevelt Union Free School Dist., 689 N.E.2d 890 (N.Y. 1997).

69. 68 Cal. Rptr. 2d. 902 (Cal. App. 1997).

70. FTR International v. City of Pasadena, 62 Cal. Rptr. 2d 1 (Cal. App. 1997). *See also,* San Jose Construction Group v. Loudoun County School Board, 1998 Va. Cir. Lexis 364 (1998).

71. *See* McGovern v. City of Chicago, 118 N.E. 3 (Ill. 1917).

long as there is no favoritism, improvidence, fraud or corruption.[72]

- **When is Acceptance?**

A contract exists when the public owner awards the contract and notifies the contractor of the award. Execution of the agreement is merely a formality. In *David Copperfield's Disappearing Inc. v. Haddon Advertising Agency*,[73] the court held that since the essential terms of the agreement of the parties had been finalized, the execution of a written contract was not intended as a condition precedent to a contract. The factors considered by the court included: (1) whether this is the type of business arrangement that is reduced to writing; (2) whether the amount of money involved was substantial; (3) whether significant provisions were not previously discussed or agreed upon; and (4) whether the parties' negotiations show that a writing was anticipated. The parties' conduct and statements following their oral agreement were therefore relevant to the question of whether a binding contract ever came into existence.

Rejecting the Bid

A public owner has discretion to reject bids.[75] For example, under Illinois law "any and all bids received in response to an advertisement may be rejected by the purchasing agent . . . if the public interest may otherwise be served thereby."[76] Paragraph 5.2 of AIA A701 allows the owner to reject any bid. It specifically notes that rejection may be based on lack of bid security or incomplete or irregular bid data. (See box at top of page 154.)

In *Kim Construction v. Board of Trustees of the Village of Mundelein*,[77] the board had discretion to rebid the entire project instead of taking the responsive lowest bidder where two lower bidders submitted bids with irregularities.

Under New Jersey law, publicly bid contracts cannot be awarded in a piecemeal fashion. In *Seacoast Builders v. Howell Township Board of Educ.*,[78] the board awarded three of five prime contracts. It rejected the lowest bidder for the other two contracts because their bids exceeded the estimated budget. Because the law required all five prime contracts to be awarded at the same time, the court admonished the board that the award of the initially acceptable bids should have been held pending the rebid of the others, so that all five primes could be awarded at the same time. Because the work had already begun under the three awarded contracts and the board had acted in good faith in rejecting the other two, the court ordered the board to re-bid the other two contracts, rather than award the contracts to the rejected bidders.

72. *See* Acme Bus v. Board of Education, 689 N.E.2d 890 (N.Y. 1997)(Public owner may engage in post-bid negotiations with the lowest bidder.). *See also*, 720 ILL. COMP. STAT. 5/33E-12(3). (Unit of local government and the state has authority to negotiate with the lowest responsible bidder for a price reduction.).

73. 897 F.2d 288 (7th Cir. 1990). *See also*, Illinois Procurement Code, 30 ILL. COMP. STAT. 500/20-10(g) (A contract is formed when written notice is served upon the lowest responsible responsive bidder.).

74. 612 N.E.2d 890 (Ill. App. 1993).

75. 65 ILL. COMP. STAT. 5/9-3-26.

76. 65 ILL. COMP. STAT. 5/8-10012.

77. 14 F.3d 1243 (7th Cir. 1994). *Cf.* Petricca Construction v. Commonwealth, 640 N.E.2d 780 (Mass. App. 1994) (Awarding authority's inability to articulate a public interest coupled with lack of evidence of potential delay and litigation justifying rejection, resulted in an injunction precluding rejection of all bids and rebidding.).

78. 718 A.2d 1225 (N.J. Super. 1998).

- **Documenting the Basis for Awarding/Rejecting Bid**

It is at the time the awarding authority awards or rejects the bid that its intent is measured.[79] The recommendation of the purchasing officer at the time of award or rejection by the awarding authority establishes the rationale for its decision. The rationale for the decision should be carefully documented as it may form the basis for successful judicial review.[80]

- **Constitutionally Impermissible Basis for Rejecting Bids**

Discrimination based upon race, sex, or national origin cannot be the basis of rejecting a bid. Similarly, a past history of filing contract claims without some evidence of abuse is not a basis for rejecting bids.[81]

BID, PERFORMANCE AND PAYMENT SECURITY

Bid Security

State law controls whether bid security is required. For example, bid security is not required under Illinois law. It is discretionary with the public entity soliciting bids.

> Cash, cashier's check, a certified check, a comptroller's certificate of moneys owed the particular vendor, or a bid bond with adequate surety approved by the purchasing agent as a deposit of good faith in reasonable amount, but not in excess of 10% of the contract amount *may* be required of each bidder by the purchasing agent on all bids involving amounts in excess of $10,000 . . .[82]

The Instructions to Bidders, AIA A701, provides: "5.2 Rejection of Bids. A Bid not accompanied by a required Bid security or by other data required by the Bidding Documents, or a Bid which is in any way incomplete or irregular is subject to rejection."

A bid bond is a bond often required by public agencies for public construction work. The bond ensures that if the contractor is awarded the contract, the contractor will enter a formal agreement with the owner to perform the project in accordance with its bid, and to provide all necessary bonds required for the proper performance of the contract. If the principal of the bond, *i.e.*, the low successful bidder, complies with these requirements after receiving an award, the bond becomes null and void. If the contractor fails to enter into the agreement, the surety must either pay the penal sum of the bond as liquidated damages or the actual damages sustained by the owner.

It is in the owner's best interest to require a bid bond. A bid bond is recommended for construction projects because it gives some assurance that the contractor is bondable and that payment and performance bonds will be issued by a surety for the amount of the project. If a bid bond is not required, and if the contractor has not previously secured a performance and payment bond, it could take months for a bond to be secured. An audited financial statement is required by all sureties. An investigation must be performed by the surety as to the financial, technical and management capabilities.

- **Bid Security—Forfeiture**

A low bidder's refusal to enter into a contract with a public entity is cause for forfeiture of the bid security. If there is no bid security, the owner may be able to recover the difference

79. Stubbs v. City of Aurora, 160 Ill. App. 351, 360 (1911).

80. *See* 30 ILL. COMP. STAT. 500/20-40.

81. Matter of Nova Group, No. B-282947 (U.S. Comptroller General, 1999).

82. 65 ILL. COMP. STAT. 518/10-7.

between the defaulting contractor's bid and the second bidder whose contract was accepted after the low bidder refused.[83]

Illinois law neither requires a bid bond nor that bid security be forfeited upon a request to withdraw a bid if a bona fide mistake is made in the submittal.[84] In other jurisdictions where the statute requires that a bid bond must be submitted with a bid, a bid may be withdrawn before the bids are opened without a penalty. Once the bids are opened, if a bidder withdraws its bid, it also forfeits its bond. An "obvious error" does not release bid security.[85]

- **Delay in Awarding the Contract**

Recovery on a bid bond requires that all conditions have ripened to impose a duty upon the contractor to enter into the contract. The owner must award the contract in a timely manner and promptly submit the contract documents for execution to the successful bidder within the time specified. The owner's failure to follow the specification may bar recovery.

In *Hennepin Public Water Dist. v. Petersen Construction*,[86] the contractor submitted low bids for two public projects. The successful bidder was to execute the contract documents within 60 days of the closing of bids. The owner submitted the contracts 67 days after the closing of bids. The court found that the contractor was under no obligation to execute the contracts after the expiration of the 60 day period. Recovery on the bid bond was denied.

In *Hanover Area School Dist. v. Sarkisian Bros.*,[87] the specifications provided that the contract would be awarded within 60 days, requiring bidders to hold their bids for the same period. The owner requested the successful bidder to extend its bid for an additional 15 days, *i.e.*, a total of 75 days. The contractor refused. The owner rebid and awarded the contract to another bidder. The owner sought damages from the original successful contractor. The court denied recovery because the owner deviated from its own instructions to bidders. There was no default by the low bidder. The owner could not recover on the bid bond.

Performance Bond

State law also controls performance and payment bond requirements. For example, every contract for public work in Illinois requires every contractor to furnish performance and payment bonds in the full amount of the contract.[88] The statute provides that each bond is deemed to contain the following language, whether or not such provisions are inserted into the bond:

> The principal and sureties on this bond agree that all the undertakings, covenants, terms, conditions and agreements of the contract or contracts entered into between the principal and the State or any political subdivision thereof will be performed and fulfilled, and to pay all persons, firms and corporations having contracts with the principal or with subcontractors, all just claims due them under the provisions of such contracts for labor performed or materials furnished in the performance

83. Board of Educ. v. George S. Walker Plumbing & Heating, 282 N.E.2d 268 (Ill. App. 1972) (A surety's liability is limited to the penal sum of the bond.).

84. *See* 44 ILL. ADMIN. CODE § 1.900; In the Matter of Alca Industries v. Delaney, 92 N.Y.2d 775, 709 N.E.2d 97 (1999) (forfeiture of bid security upon withdrawal of bid due to mistake was irrational).

85. Georgia Dep't of Transportation v. American Insurance, 491 S.E.2d 328 (Ga. 1997).

86. 297 N.E.2d 131 (Ill. 1973).

87. 514 F. Supp. 697 (M.D. Pa. 1981).

88. 30 ILL. COMP. STAT. 550/1; 30 ILL. COMP. STAT. 500/30(2).

> of the contract on account of which this bond is given, when such claims are not satisfied out of the contract price of the contract on account of which this bond is given, after final settlement between the officer, board, commission or agent of the State or of any political subdivision thereof, and the principal has been made.[89]

A performance bond defines the duty of the surety to the owner. It is the surety's duty to the extent of the penal sum of the bond to see that the performance of the contract between the principal and the owner is fulfilled.

Payment, Labor and Material Bonds

A payment bond obligates the surety, to the extent of the penal sum of the bond, to pay those who furnished labor and material to the principal or to subcontractors of the principal in the performance of the contract between the principal and the owner.

Private construction projects may have a lien placed upon the property by an unpaid materialman or laborer. The lien may be perfected and executed upon by ultimately selling the underlying privately owned property. This is not the case with publicly-held property. The lien is only good against the money held by the public entity for the contract in question.[90]

Recovery by any person furnishing material or performing labor for a public project is usually statutorily prescribed. Failure to follow the strict requirements of the statute invalidates the claim against the bond or letter of credit. For example, the Illinois statute provides, in pertinent part:

> . . . any person having a claim for labor, and material as aforesaid shall have no such right of action unless he shall have filed a verified notice of said claim with the officer, board, bureau or department awarding the contract, within 180 days after the date of the last item of work or the furnishing of the last item of materials, and shall have furnished a copy of such verified notice to the contractor within 10 days of the filing of the notice with the agency awarding the contract . . . Provided, further, that no action shall be brought until the expiration of 120 days after the date of the last item of work . . . nor shall action of any kind be brought later than 6 months after the acceptance by the State or political subdivision thereof of the building project or work.[91]

Letters of Credit in Lieu of Bonds

Some states permit the use of letters of credit in lieu of statutorily required performance and payment bonds. Under Illinois law, letters of credit may be used in public works where contracts are less than $100,000. The statute provides:

> When other than motor fuel tax funds, federal-aid funds, or other funds received from the State are used, a political subdivision may allow the contractor to provide a non-diminishing irrevocable bank letter of credit, in lieu of the bond required by this Section, on contracts under $100,000 to comply with the requirements of this Section.[92]

89. 30 ILL. COMP. STAT. 550/1.
90. 770 ILL. COMP. STAT. 60/23.
91. 30 ILL. COMP. STAT. 550/1.
92. 30 ILL. COMP. STAT. 550/1.

CONSTRUCTION SECURITY BONDS

- **Bid Bond**—Surety assures that bidder awarded contract for public construction will enter into a formal agreement with the owner to perform the project in accordance with the bid and will provide other bonds necessary for proper performance of the contract.
- **Performance Bond**—Surety assures that contractor will perform and fulfill all the undertakings, covenants, terms, conditions and agreements of the public construction contract.
- **Payment Bond**—Surety assures payment to all those who provide labor and material to the contractor or subcontractors.
- **Letter of Credit**—May sometimes be used in lieu of performance and payment bonds.

A letter of credit may act as collateral to a guarantee to perform the primary obligation. Upon default, the public body would look to the funds callable in the letter of credit to pay the cost of completion.

The terms of the letter of credit are of critical importance. The underlying obligation must be completely and clearly defined. The guarantee must be unequivocal. The duration of the letter of credit must be defined. Specific procedures must be set forth for calling the letter of credit. Notice requirements for implementation of the letter of credit must be defined. In Illinois the statute of limitations for a construction failure is four years from the date the defect was known or should have been known. In addition, the statute of repose is ten years from the date of completion.[93] The current AIA form performance bond, on its face, is contractually limited to two years from the date of completion. From the owner's perspective, the term of a non-diminishing irrevocable letter of credit should be no shorter than two years from the date of completion.

93. 810 ILL. COMP. STAT. 5/13-214.

Consequences of a Failure to Require Mandated Performance and Payment Bonds

Failure of a public owner to require the contractor to supply a performance and payment bond exposes the public body and its officers to liability on their official bond.[94]

A public entity should ensure that it fulfills its mandatory duty to investigate and "approve" "good and sufficient sureties." This includes the requirements that the surety submit to the owner a timely certified copy of its power of attorney; a certificate from the clerk of the county that the surety has not been suspended; copies of the most

94. 770 ILL. COMP. STAT. 60/23. *See also,* East Peoria Community High School Dist. No. 309 v. Grand Stage Lighting, 601 N.E.2d 972 (Ill. App. 1992); George Weis Co. v. Dwyer, 956 S.W.2d 335 (Mo. App. 1997) (Board was protected by doctrine of official immunity when it failed to secure a bond in accordance with the statute.).

recent annual statement and quarterly statement filed with the department of insurance; and receipt of the county clerk's certificate of authority to transact surety insurance in the state. In *Walt Rankin & Associates v. City of Murrieta*,[95] the subcontractor was an intended beneficiary of the statutory scheme with a right to recover against the public entity. Had the city made inquiry, the surety would have been rejected for failure to maintain sufficient capital and surplus as required by the insurance commissioner. The subcontractor could recover in tort against the city for damages proximately flowing from the city's breach of its mandatory duty.

BID MISTAKES

Circumstances Warranting Judicial Relief From a Bid Mistake

The Illinois Supreme Court in *John J. Calnan Co. v. Talsma Builders*,[96] established three elements which must be plead and proven before a contract will be rescinded for mistake by one of the parties. "First, the mistake must relate to a material feature of the contract; second, it must have occurred despite the exercise of reasonable care; and third, the other party must be placed in *status quo*."[97] *Wil-Fred's, Inc. v. Metropolitan Sanitary Dist. of Greater Chicago*[98] adds a fourth element: the mistake must be of such grave consequence that enforcement of the contract would be unconscionable.

State law may require a request for verification where there is a patent error in a bid. For example, Illinois has adopted bid mistake procedures very similar to the federal acquisition and requisition procedures. An acquisition officer who receives a bid patently in error must request verification of the bid submittal from the bidder.[99] Under federal law, the acquisition officer must notify the bidder in writing that he suspects a mistake in the bid *and* the disparity between the bid and the government's estimate. A request that the bidder only verify the accuracy of the bid submittal without disclosing the suspicion of error has been deemed inadequate.[100]

- **Material Feature of the Contract**

Illinois bid mistake cases suggest that a mistake equal to or greater than 10% of the total value of the bid is considered by the courts as a material mistake. For example, $31,000 error in a $237,000 contract was considered material in *John J. Calnan Co. v. Talsma Builders*.[101]

- **Neglect in the Preparation of the Bid**

The bidder must demonstrate it exercised reasonable care in the preparation of the bid. The bidder must establish that a check or verification procedure was used to prepare the bid.

Courts have recognized excusable neglect in the preparation of bid submittals. Time has been recognized as a critical factor excusing neglect. For example, in *People ex rel. Department of Public Works & Buildings v. South East National Bank*,[102] subcontractor proposals were received at the last minute. A secretary errone-

95. 101 Cal. Rptr. 2d 48 (Cal. App. 2000).

96. 367 N.E.2d 695 (Ill. 1977).

97. *Id.* at 698.

98. 372 N.E.2d 946, 950-551 (Ill. App. 1978).

99. 44 ILL. ADMIN. CODE § 1.1310.

100. Turner-Mak JV, ASBCA No. 37711, 96-1BCA ¶ 28,208.

101. 367 N.E.2d 695 (Ill. 1977). *See also* Community Consolidated School v. Meneley Construction, 409 N.E.2d 66 (Ill. App. 1980) (error greater than 10% deemed material on contract for $337,928); Wil-Freds, Inc. v. Metropolitan Sanitary Dist., 372 N.E.2d 946 (Ill. App. 1978) (17% disparity between the mistaken bid and next lowest bidder); People ex rel. Dep't of Public Works and Buildings v. South East National Bank of Chicago, 266 N.E.2d 778 (Ill. App. 1971) (10% error).

102. 266 N.E.2d 778, 779 (Ill. App. 1971)("Where the mistake is due to clerical or arithmetic error, the courts are unanimous in granting recession or other appropriate relief." *Id.* at 781.).

ously entered on the tally sheet and bid submittal form $2,617 instead of the quoted $26,170 for the cost of the equipment. Immediately upon the public announcement of the bids, the general contractor notified the public entity that a mistake had been made and requested to withdraw its bid. Relief was granted.

In *John J. Calnan v. Talsma Builders,*[103] the subcontractor did not discover the mistake until four months after the request for a bid was made. The vice president admitted that the company had a double check system in place but failed to use it for the bid in question. The court concluded that reasonable care was not exercised in the preparation of the bid.[104]

- **Maintaining the *Status Quo***

The ability of the owner to award the contract to the next lowest bidder is sufficient to establish maintenance of the *status quo.* Early discovery of the mistake and the ability of the owner to enter into a contract with the next lowest bidder has been held sufficient to fulfill the requirement of maintaining the *status quo.*[105]

Relief will not be granted when significant delay impairs the owner's ability to award the contract to the next lowest bidder. In *John J. Calnan Co. v. Talsma Builders,* a four month delay in notifying the general contractor of a bid mistake after work had commenced, could not result in the general contractor being returned to the *status quo.*

- **Owner's Knowledge of the Mistake**

Where the owner has reason to suspect the mistake due to the disparity in the bids or the disparity in the bid as compared to the architect's estimate, or where the owner has specific knowledge of the mistake, relief is generally granted. In *Wil-Fred's Inc. v. Metropolitan Sanitary Dist.,* a 26% disparity between the low bidder and the next bid was sufficient to put the owner on notice of the material error.[107]

- **Unconscionability**

Although unconscionability is not an element, the materiality of the mistake is a significant equitable factor and must be equated to the gravity or consequences of the mistake.

Circumstances Not Warranting Judicial Relief

- **Unilateral Mistakes**

A unilateral mistake is not grounds for relief. However, Illinois courts will allow relief for a mistake of fact, *i.e.,* clerical errors, such as arithmetical computations, transpositions, a misplaced decimal point, typographical errors or errors that result from transferring figures from a take-off sheet to the bid form. Relief may be given if the bid mistake arose out of misleading specifications.[108] Bid mistake is a common reason for the low bidder to withdraw its bid or refuse to enter into a contract.

In some instances, a court will allow a bidder to reform its bid and perform the contract where the mistake was not due to negligence.[109]

103. 367 N.E.2d 695 (Ill. 1977).

104. *Accord* Community Consolidated School v. Meneley Construction, 409 N.E.2d 55 (Ill. App. 1980) (court concluded that "logic and standard practice in the community would require checking for the type of error that in fact occurred").

105. *See, e.g.,* Community Consolidated School v. Meneley Construction, 409 N.E.2d 55 (Ill. App. 1980); Santucci Construction v. County of Cook, 315 N.E.2d 565, 570 (Ill. App. 1974); Wil-Fred's Inc. v. Metropolitan Sanitary Dist., 372 N.E.2d 946, 952 (Ill. App. 1978) (notice within 48 hours).

106. 367 N.E.2d 695 (Ill. 1977).

107. 372 N.E.2d 946, 952 (Ill. App. 1978).

108. *Id.*

109. Illinois Dep't of Public Works & Buildings v. South East National Bank, 266 N.E.2d 778, 781 (Ill. App. 1971) (recision granted).

- **Errors in Business Judgement**

Relief is not given for a poor business decision.

Establishing a Bid Mistake

- **Bidder's Burden of Proof**

"A BID MISTAKE MUST BE PROVEN BY 'CLEAR AND POSITIVE' EVIDENCE."

Evidence of the conditions giving rise to an excusable mistake must be clear, convincing and positive.[110] A bid mistake must be proven by "clear and positive" evidence.[111] The bidder must demonstrate by the bid take-off sheets how the error was committed. Bid proposals, subcontractor's tabulation sheets and other working documents which set forth the basis of the bid and the cause of the mistake is the evidence upon which a decision must be made.[112]

- **Owner's Response to a Claim of Bid Mistake**

Upon notification by a bidder that a bid mistake has occurred, the owner should immediately demand submittal of the original bid preparation documents that demonstrate the error, coupled with a detailed explanation of the error. Promptly thereafter, a meeting should be held for the bidder to explain and demonstrate by the documentation how the error occurred. Only then should the owner decide whether to allow the bidder to withdraw the bid because of mistake.

CHALLENGES TO THE AWARD

Access to Information (Freedom of Information Act)

The public announcement of the bid submittal upon opening is not the limit of access to bid materials. Freedom of information laws can be a valuable competitive tool in ascertaining the bid submittals of competitors. Two exemptions under Illinois law affect access to bid documents. Submittals which include trade secrets and proprietary commercial or financial information are not subject to disclosure.[113] However, the confidentiality of this information can be waived. Therefore, bid documents should indicate where bid submittals include trade secrets and proprietary commercial or financial information. Also exempted from disclosure are proposals or bids which if disclosed would frustrate procurement or give an advantage to any person proposing to enter into a contract. An example is information prepared by the public body, *e.g.*, a bid estimate. This information is exempt until an award or final selection is made.[114]

Standing

- **Taxpayer**

Public bidding is generally recognized to protect the public purse. The status as a resident of the taxing district or as a taxpayer of the district generally has afforded the individual the right to challenge an illegal contract.[115]

110. Crilly v. Board of Educ., 54 Ill. App. 71 (1894).

111. Wil-Fred's Inc. v. Metropolitan Sanitary Dist., 372 N.E.2d 946, 951 (Ill. App. 1978).

112. T.P.K. Construction v. O'Shea, 407 N.E.2d 1331 (N.Y. App. Div. 1980).

113. 5 ILL. COMP. STAT. 1407(g).

114. 5 ILL. COMP. STAT. 1407(h).

115. The Consumers Co. v. City of Chicago, 313 Ill. 408, 417 (1924).

- **Unsuccessful Bidder**

In *Cardinal Glass v. Board of Educ. of Mendota Community Consolidated School Dist. No. 289*,[116] the court held that an unsuccessful bidder for a public contract has standing to sue for injunctive and mandamus relief. The court reasoned that unsuccessful bidders could more effectively ensure compliance with the statute than could taxpayers because bidders have a greater stake than do taxpayers. Thus, allowing an unsuccessful bidder to sue would promote tax savings. This reasoning appears to have been approved by the Illinois Supreme Court in *Court Street Steak House v. County of Tazewell*,[117] but in *Amtech Systems v. Illinois State Toll Highway Authority*,[118] a supplier lacked standing to challenge a request for proposals so narrowly drawn that only one supplier's product could meet the request.

At the federal level, unsuccessful bidders have not been as successful in challenging an award of a contract. An unsuccessful bidder must demonstrate that if its bid had been fairly and honestly considered, it would have been within the zone of active consideration or that there was a substantial likelihood it would have received the award.[119]

- **Indispensable Parties**

The successful bidder awarded the contract is a necessary and indispensable party to a challenge to an award of a publicly bid contract.[120]

Theories of Challenge to Bid Awards

Courts express a deference to a public agency's exercise of discretion in the award of a publicly bid contract. A challenge to the award of a contract must demonstrate palpable abuse of discretion or manifest injustice to be successful.[121] The disappointed bidder must establish that either the agency's decision had "no rational basis" or the procurement process involved a clear and prejudicial violation of applicable law.[122]

- **Mandamus**

For mandamus to issue, a clear legal right and a clear duty must be established. Generally, the award of a contract involves the exercise of discretion and judgment which is not subject to review or control by mandamus. However, mandamus will issue if a plaintiff alleges and proves fraud, lack of authority, unfair dealing, favoritism or similar arbitrary conduct by a contracting authority when awarding a competitively bid contract.[123]

- **Injunctive Relief**

The initiation of a temporary restraining order or preliminary injunction to enjoin the award of a public contract and/or enjoining the commencement of construction requires overcoming significant obstacles. Economic loss alone may not constitute irreparable harm. Irreparable economic harm may arise if the very existence of the business would be threatened without an injunction. Few construction companies can allege that the denial of one contract would force it out of business. An adequate remedy at law exists if the cost incurred in preparing the bid is recoverable. Establishing the likelihood of success compels the

116. 447 N.E.2d 546 (Ill. App. 1983).

117. 643 N.E.2d 781, 785-86 (Ill. 1994).

118. 637 N.E.2d 619 (Ill. App. 1994).

119. Look v. United States, 113 F.3d 1129 (9th Cir. 1997).

120. Burt v. Board of Educ. of Coal City, 477 N.E.2d 247 (Ill. App. 1985).

121. Williams Brothers Construction v. Public Building Comm., 612 N.E.2d 890, 895 (Ill. App. 1993).

122. Advanced Seal Technology v. Perry, 873 F. Supp. 1144, 1150 (N.D. Ill. 1995).

123. Court Street Steak House v. County of Tazewell, 643 N.E.2d 781, 784 (Ill. 1994).

disappointed bidder to demonstrate either that the decision maker had no rational basis for its decision or that its procedure constituted a clear and prejudicial violation of the applicable law. The disappointed bidder has the burden of establishing that it had a substantial chance that it would have been awarded the contract had the public entity followed the proper procedures. The challenger must demonstrate that the balance of harm is in its favor, *i.e.*, the harm it would suffer if the injunction is denied is far greater than the harm the public entity would suffer if the bid award is enjoined. Finally, the bidder must successfully plead and argue that the public interest in compelling public officials to perform their duties in strict and full accordance with the law justifies the interruption of public business and interference with the bidding and award process.[124]

The presumption is that public authorities act regularly and lawfully. Illinois courts have expressed an unwillingness to interfere with the exercise of official discretion by municipal authorities in awarding contracts in the absence of fraud.[125]

- **Deprivation of Due Process**

Generally, an unsuccessful bidder on a state contract does not have a property interest in that contract.[126] A post-deprivation hearing is sufficient process to avert a liberty interest claim.[127]

However, termination or impairment of contract rights based upon political affiliation or support states a cause of action. In *O'Hare Truck Service v. City of Northlake*,[128] a cause of action under section 1983 was stated based upon the allegations that the city removed a towing contractor from the rotation list because of the contractor's alleged failure to make political contributions to the mayor and its political support of the mayor's opponent. The district court's dismissal was affirmed by the Seventh Circuit but reversed by the U.S. Supreme Court. The protections afforded by *Elrod* and *Branti*, extend to instances where the governmental entity retaliates against a contractor or a regular provider of services due to the exercise of its right of political association and/or expression of political allegiance.

- **Methods of Avoiding Challenges**

One successful technique is to include a waiver in a bid request. In *Sedona Contracting v. Ford, Powell & Carson, Inc.*[129] the application of the waiver clause[130] barred defamation and interference with business relations claims against the architect who recommended rejection of the low bidder as not qualified. The architect in making its recommendation was also cloaked with qualified immunity. Because significant statutory rights are being waived, the viability of such language may be doubtful when collusion, fraud, and favoritism are alleged as the basis of awarding the contract.

Another successful technique is to submit all bid challenges to final and binding arbitration. The owner would submit to arbitration because

124. *See* Advanced Seal Technology v. Perry, 873 F. Supp. 1144 (N.D. Ill. 1995).

125. People v. Omen, 124 N.E. 860, 864 (Ill. 1919).

126. Montauk Bus v. Utica City School Dist., 30 F. Supp. 2d 313 (N.D.N.Y. 1998).

127. Systems Contractors v. Orleans Parish School Board, 148 F.3d 571 (5th Cir. 1998); Mid-American Waste Systems v. City of Gary, 49 F.3d 286 (7th Cir. 1995).

128. 47 F.3d 883 (7th Cir. 1995), *rev'd and remanded*, 518 U.S. 712 (1996).

129. 995 S.W.2d 192 (Tex. App. 1999).

130. The waiver language read: "By submitting a bid, each bidder agrees to waive any claim it has or may have against the Owner, the Architect/Engineer, and their respective employees, arising out of or in connection with the administration, evaluation, or recommendation of any bid; waiver of any requirement under the Bid Documents; or the Contract Documents; acceptance or rejection of any bids; and award of the Contract."

it wants to award the contract and move on with the project. The delay and uncertainty of litigation alone may result in a construction disaster. Final and binding arbitration has proven for the author a successful and cost effective means of resolving bid award challenges.

Recovery

- **Lost Profits**

Assuming mandamus is the appropriate remedy, what should the recovery be? It has long been held that an award of a contract to one other than the lowest bidder does not entitle the lowest bidder to a recovery of damages from the municipality, nor to an action to recover the profits that it might have made had its bid been accepted.[131]

Other jurisdictions allow the disappointed bidder to recover lost profit, attorney's fees and protest costs from the municipal entity that violated the public procurement statute.[132]

- **Bidding Expenses**

Bid preparation expenses are recoverable.[133] However, in *George N. Kennedy Construction v. City of Chicago*,[134] the bidder failed to specify bid preparation expenses in its prayer for relief and therefore was precluded from recovering such expenses as damages.

131. Court Street Steak House v. County of Tazewell, 643 N.E.2d 781, 786 (Ill. 1994) (expressly approving the reasoning in Beaver Glass and Mirror v. Board of Educ. of Rockford School Dist. No. 205, 376 N.E.2d 377, 380 (Ill. App. 1983)); Lawrence Brunoli, Inc. v. Town of Branford, 722 A.2d 271 (Conn. 1999).

132. City of Durant v. Laws Construction, 721 So.2d 598 (Miss. 1998).

133. State Mechanical Contractors v. Village of Pleasant Hill, 477 N.E.2d 509, 513 (Ill. App. 1985).

134. 491 N.E.2d 1160, 1162-63 (Ill. 1986).

SUBCONTRACTORS AND THE BIDDING PROCESS

Brokering

The "general contractor" who performs no work with its own forces and subcontracts all "general contract" work has been subject to much criticism. To combat this problem, knowledgeable public owners have required the general contractor to perform a certain percentage of the work with its own forces.

Imposition of an obligation on the general contractor to perform a percentage of the work with its own forces is enforceable. But courts sometimes take different views.

Bid Shopping

Bid shopping is the act of a general contractor, after receiving the award of a contract, to shop for the lowest price from subcontractors. A general contractor's bid is usually based upon "firm" prices from a "low" subcontractor. The jilted subcontractor may bring action against the prime under two theories: (1) because the general contractor submitted its bid using the subcontractor's bid as its own it accepted the subcontractor's bid and thus entered into a binding contract with the subcontractor; (2) the general contractor entered into an oral contract with the subcontractor.

CONTRACTOR'S OBLIGATION TO PERFORM PORTION OF WORK

- *Valley Crest Landscape v. City of Davis*[135]—The contractor was required to identify its subcontractors and the respective percentage of the work to be performed by its own forces and its subcontractors. The court refused to allow the city to waive the requirement as an immaterial irregularity.
- *Ghilotti Construction v. City of Richmond*[136]—Rejecting *the Valley Crest* holding, the court permitted the city to exercise its discretion to allow the low bidder to reform its bid to meet the requirement that the bidder perform half of the work with its forces. The court, looking to the public interest, concluded that reformation of the bid to comply with the specifications was not based on favoritism and furthered the public interest in securing the lowest bid. The defect was waivable in that it did not give the contractor an unfair advantage.[137]

Holding the Subcontractor to its Bid

A successful prime contractor sometimes faces a subcontractor unwilling to perform at the price of the original bid. This may arise as a result of the submission of a bid mistake, unwillingness to perform the work, or the submittal of a subcontract which materially alters the terms of the bid submittal. Since a formal executed contract does not exist, various theories have been used to bind the subcontractor to its price.

Promissory estoppel has proven successful to the general contractor seeking to recover damages due to the subcontractor's refusal to honor its bid.[138] However, in *Camosy, Inc. v. River Steel,*[139] the court affirmed a directed verdict in favor of a subcontractor, where the general contractor sought to impose promissory estoppel against the subcontractor's refusal to enter into a subcontract. The bid submittal of the subcontractor was significantly low. It expressly excluded steel for stairs, ladders and railings and upon award it was discovered that the price did not include erection.

The statute of frauds also may come into play. Typically, subcontractors provide primes a telephone quote at the last minute. This occurs because of the exigency of the process or on some occasions to prevent general contractors from engaging in pre-award bid shopping. The success of the general contractor's invocation of the statute of frauds to bar evidence of an oral contract depends upon whether a sale of goods covered by the Uniform Commercial Code is involved or whether it is the sale of services.

135. 49 Cal. Rptr. 2d 184 (Cal. App. 1996).

136. 53 Cal. Rptr. 2d 389 (Cal. App. 1996).

137. *See also* Williams Brothers Construction v. Public Building Comm. of Kane County, 612 N.E.2d 890 (Ill. App. 1993) (Bidder's failure to list subcontractors on the submittal bid form was immaterial and a waivable variance from the bid specifications.).

138. Jenkins & Boiler Co. v. Schmidt Iron Works, 344 N.E.2d 275, 278 (Ill. App. 1976). *But see* Santucci Construction v. County of Cook, 315 N.E.2d 565, 569 (Ill. App. 1974).

139. 624 N.E.2d 894 (Ill. App. 1993).

CONCLUSION

The bidding process sets the stage for the entire course of construction. Failure to pay attention to minute details in the bid specifications can result in economic disaster. Allocating the risk associated with the contract as well as engineering the performance of the project is the essence of the exercise. Understanding the law of bidding affords the public owner quick response time should disaster strike when the bids are opened. Failure to respond quickly will sow the seeds of disaster.

Chapter 7

EFFECTIVE CONSTRUCTION CONTRACTS BETWEEN SCHOOLS AND GENERAL CONTRACTORS

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INTRODUCTION

It has been said that the relationship between a public agency and the low bidder on the agency's construction project is like that of the bride and groom in an arranged marriage—strangers thrown together by circumstance and forced to make the best of their new and untried union. Attorneys for the public agency must focus on creating the best "pre-nuptial" agreement for these soon-to-be married strangers.

Good contract documents are key to a successful school construction project. Clear contract language can often prevent a dispute. In other situations, such as where a building contractor is being unreasonable, clear language can resolve a dispute more quickly, with less cost, and with a greater chance of success for the school district.

"GOOD CONTRACT DOCUMENTS ARE KEY TO A SUCCESSFUL SCHOOL CONSTRUCTION PROJECT."

This chapter focuses on provisions regarding six key elements of an effective school construction contract between a school district ("owner") and a general building contractor ("contractor"): (1) change orders, (2) hazardous materials, (3) safety, (4) performance and payment bonds, (5) indemnification, and (6) termination provisions. The following discussion necessarily is general and owners and their legal

counsel and construction consultants should determine specific applicable law in their jurisdictions as well as tailor the provisions to the specific project.

In this chapter, the phrase "the contract between the owner and general contractor" includes not just the document entitled "Agreement between the Owner and General Contractor" but also related documents which are often defined as part of the contract, such as the general conditions, any special conditions, and performance and payment bonds.

CHANGE ORDERS

In a world seemingly dominated by Murphy's maxim that "anything that can go wrong, will go wrong," it is particularly important to be protected by a good change order provision. An owner's authority to require a contractor to implement changes stems from this provision, as can the determination of who is responsible for costs associated with the change. The change order provision is frequently a pivotal element of a construction contract, as well as fixture of many construction contract disputes.

Authority to Issue Change Orders

The contract should clearly spell out who may issue change orders, and under what circumstances. For example, the architect may be authorized to issue change orders if the change in total contract value is less than a specified dollar amount. Alternately, the owner, or a particular designee, could be granted sole authority to issue a change order. The agreement should specify by position which personnel of the owner (and/or the architect) are authorized to issue change orders.

The contract should also clearly set forth the owner's ability to order a construction change directive, whereby the contractor must commence work on the change order even if there is an ongoing dispute, for example as to adequate compensation for the change. Without such a provision, the contractor could essentially hold the project hostage during change order negotiations.

Responsibility for Change Orders

The contract should allocate responsibility for change order-related costs under particular circumstances. Circumstances which should be addressed are shown below:

WHO PAYS FOR CHANGE ORDER COSTS?

- Change orders resulting from the contractor's error. The contractor should be responsible for these costs.
- Change orders resulting from the architect's error. One approach to this situation would be to hold the owner responsible to the contractor, but provide in the architect's agreement that the architect is required to reimburse the owner.
- Change orders resulting from the owner's desire or need to change the project specifications. The owner generally should bear the costs of these change orders.

Additional costs may be associated with change orders, and should be addressed in the contract. Liability for such costs may be limited by a provision stating that recovery under the change order section of the contract is limited to the costs and time related to direct performance in compliance with the change order. However, contractors

may be able to recover indirect costs via other provisions of the contract. The risk of liability for such indirect costs of change orders should be considered when drafting the entire agreement.

Of particular concern is the area of delay damages. Contractors may claim that a change order, or several change orders collectively, caused a delay in the overall completion of the project, leading to additional costs to the contractor. The delay damages provision of the contract should state that costs associated with delay due to change orders will only be compensable if (1) the change order resulted from the owner's (or possibly architect's) error, and (2) the delay is directly attributable to one or more specific change orders.

Miscellaneous Provisions Related to Change Orders

The change order provision should state whether change orders must be in writing or may be oral. Although written change orders can occasionally be cumbersome, a requirement of written change orders may head off problems in the future.

HAZARDOUS MATERIALS

Liability for a mishap involving hazardous materials can be catastrophic. It is therefore important to have adequate hazardous materials protections built into the contract. First, hazardous materials should be clearly and expansively defined. If the state in which the contract is to be performed has a statutory definition of hazardous materials, that definition may be used as a starting point.

Second, the contract should specify a very high level of care for any use of hazardous materials by the contractor, and require supervision by qualified personnel of all work involving hazardous materials. Thus, if an incident occurs, the contractor can be held to the level of care established in the agreement, rather than the potentially lower negligence standard.

The contract should provide a procedure in the event hazardous materials are discovered on the site. This procedure should emphasize safety and containment. In the event an individual gets hurt, the owner will have the defense of having an appropriate procedure in place. If the contractor failed to abide by the procedure, the contractor should be held responsible for the injury.

Finally, the agreement should have an indemnification provision whereby the contractor must defend, indemnify, and hold the owner harmless for any claims related to any injuries caused by hazardous materials brought onto the site and/or mishandled by the contractor.

SAFETY

Detailing procedures and responsibility for safety of people and property in the construction documents can both help to prevent damage or injury and to protect the owner from liability in the event of a lawsuit. Following are several important safety issues that every construction contract should address.

First, the contract should specify that the contractor is solely responsible for and has control over construction methods and techniques. This provision places responsibility upon the contractor for injury to life or property during construction.

Secondly, the contract should expressly require the contractor to use its best professional efforts to use all appropriate safety procedures and seek to avoid injury or property damage. This should include, but not be limited to, obeying all laws, ordinances, and regulations applicable to the work being performed, and complying with all limiting specifications of equipment (e.g., load or temperature limits). The contractor should also be required to protect materials from damage and the elements, both during construction and non-working hours.

Thirdly, the contract should contain an explicit indemnification provision holding the contractor responsible for all injuries or property damage to the extent that the injury or damage was not the owner's fault. Additionally, the contractor should be required to indemnify the owner for claims relating to injuries or damage by or to subcontractors to the extent that the injury or damage was not the owner's fault.

Finally, the contract should address safety emergencies. The contractor should be required to take appropriate immediate action to protect people and property. The contractor should prepare a written report of any emergency situation, and immediately contact the owner in the event of serious injury or property damage.

PERFORMANCE AND PAYMENT BONDS

Performance Bond

There are generally two obligations of the contractor for which the owner must or should require the contractor to furnish a surety bond. (For more discussion of constructions bonds, see L. Slutzky, *School Construction Bidding Issues, supra,* at 162.) The first obligation is that of faithful performance of all of its obligations under the contract. This is known as a performance bond and is typically for the amount of the contractor's bid. The purpose of the performance bond is to ensure that the contractor will perform the contract; if the contractor fails to perform, the bond provides a form of surety that will serve to guarantee the project will be completed within the bid price.

The obligee or beneficiary under a performance bond is the project's owner, i.e., the awarding authority, and the bond principal is generally the prime contractor on the project.

The construction contract should require that the performance bond furnished in response to the contract's requirements incorporate all of the terms of the contract by reference into the bond. By incorporating by reference the entire underlying construction contract, the surety is guaranteeing every term covenant and condition in the contract, not just completion of the project. When the owner receives a proposed performance bond at the beginning of the project, the owner's attorney should review the terms of the performance bond to ensure that they do not conflict with the terms of the contract.

It is important to spell out the kinds of costs and damages for which the contractor may be liable and, through the incorporation by reference, the damages for which the performance bond surety may be liable. (See box below.) The construction contract should also require that the "performance" secured by the bond include any and all authorized modifications of

POSSIBLE COSTS AND DAMAGES SECURED BY PERFORMANCE BOND

Under a performance bond, a surety can be liable for:

- Cost to complete the project;
- Cost to repair or replace defective construction;
- Actual delay or liquidated damages of the owner if the contract provides for them;
- Indemnification and defense of the owner from injury suffered on the job, if the contractor's liability insurance has lapsed;
- Cost to remove mechanics' liens or stop notices claimed, recorded, or filed by subcontractors and suppliers; and
- Consequential damages from the contractor's breach or delay.

the contract, change orders, extensions of time, and other alterations and additions to the terms of the contract or to the project or its specifications.

Payment Bond

The second obligation that should be secured by a bond is to pay for all work and materials furnished to the job. This is known as a payment (or materials and labor) bond and is typically for an amount that is a fixed percentage of the contractor's bid, up to 100% of the bid amount. A payment bond is designed to serve as a guarantee that all those supplying labor and materials for the project will be paid. This guarantee provides claimants with the right to file a direct action against the surety as well as the contractor, and serves to balance out the fact that those supplying labor and materials for publicly-owned projects are prevented by law from recording and foreclosing on mechanics' liens against the owner and its publicly-owned property.

The payment bond, by its terms, enures to the benefit of all claimants so as to give those persons a right of action to recover upon the bond in any suit brought to enforce the right of payment for labor and materials furnished to the job. Such a bond is a statutory requirement in all states and generally must be executed by a surety insurer who is licensed to transact surety business within the state.[1] The acceptance of payment bonds issued through non-licensed payment bond sureties is not recommended.

The payment bond must provide that if the original contractor or a subcontractor fails to pay any of the persons supplying labor or materials to the project, then the surety will pay the claims in an amount not exceeding the sums specified in the bond, plus reasonable attorneys' fees if an action is brought on the bond.

INDEMNIFICATION

Indemnity clauses are customarily included in contracts for the construction of public facilities. Express indemnity clauses are included as one feature of an overall risk management strategy that is combined with insurance requirements in construction contracts.

The interpretation of an indemnification provision depends on a variety of rules established by state cases and statutes. An attorney who is involved in drafting, enforcing, or defending against indemnity provisions must become familiar with the relevant state authorities addressing the enforcement and interpretation of express indemnity provisions.

Indemnification of Owner

The typical indemnification clause should require the contractor to defend, indemnify, and hold harmless the owner, its governing board, officers, agents, trustees, and employees against and from any and all liability for:

1. In some states, the owners of public projects have a mandatory duty to investigate the payment bond surety, in advance of accepting the payment bond, to determine the solvency of the surety and to ensure that the payment bond is executed by a duly licensed surety insurer. If it fails to carry out its duty to require and receive an appropriate bond or to properly investigate the payment bond surety, the owner may be liable for loss of payment to subcontractors and suppliers. *See, e.g., Walt Rankin & Associates v. City of Murrieta,* 84 Cal. App. 4th 605, 101 Cal. Rptr. 2d 48 (2000); *Palm Beach County v. Trinity Industries,* 661 So. 2d 942 (Fla. App. 4 Dist. 1995); *Kammer Asphalt Paving v. East China Township Schools,* 443 Mich. 176, 504 N.W. 2d 635 (1993).

SAMPLE CLAUSE FOR INDEMNIFICATION OF ARCHITECT, INSPECTOR AND STATE

To the fullest extent permitted by law, contractor is required to defend, indemnify and hold harmless the Project's architect, the architect's consultants, the inspector of record, the state, and their respective agents, employees, officers, volunteers, and directors from and against claims, damages, losses, and expenses (including, but not limited to, attorneys' fees and costs, including fees of consultants) arising out of or resulting from performance of the construction contract, including, but not limited to, the contractor's or its subcontractor's use of the project site; the contractor's or its subcontractor's construction of the project, or failure to construct the project, or any portion thereof; the use, misuse, erection, maintenance, operation, or failure of any machinery or equipment, including, but not limited to, scaffolds, derricks, ladders, hoists, and rigging supports, whether or not such machinery or equipment was furnished, rented, or loaned by any of the indemnitees; or any act, omission, negligence, or willful misconduct of the contractor or its subcontractors or their respective agents, employees, material or equipment suppliers, invitees, or licensees, but only to the extent caused in whole or in part by the acts or omissions of the contractor, its subcontractors, anyone directly or indirectly employed by any of them, or anyone for whose acts they may be liable, regardless of whether or not such claims, damages, loss, or expense is caused in part by a party indemnified under the construction contract.

- damages on account of injury to or death of persons;
- damage to property;
- delay; or
- damage to another contractor, resulting from or arising out of, or in any way connected with the performance by the contractor of the construction contract.

Indemnification of Architect, Inspector and State

Additionally, to the fullest extent permitted by state law, the contractor should be required to defend, indemnify and hold harmless the project's architect, the architect's consultants, the inspector of record, the state, and their respective agents, employees, officers, volunteers, and directors from and against claims, damages, losses, and expenses. (See box at top of page.)

Other Indemnification Requirements

The indemnification clause should further require the contractor to reimburse the indemnitees for all costs, attorneys' fees, expenses, and loss incurred by them in consequence of any claims, demands, or causes of action which may be brought against them, arising out of the performance by the contractor of the construction contract.

A similar indemnification clause should apply to subcontractors. This can be done by including language in the construction contract which requires that any and all subcontracts entered into by the contractor for the project must include the same indemnification terms. The construction contract should further provide that in the event more than one subcontractor is connected with an accident or occurrence covered by the indemnification clause, then all such subcontractors will be jointly and

severally responsible to each of the indemnitees for indemnification and the ultimate responsibility among such indemnifying subcontractors for the loss and expense of any such indemnification must be resolved without jeopardy to any indemnitee.

Finally, a construction contract should provide that the obligations of contractor and the subcontractors to indemnify and defend the owner and the indemnitees include, without limitation, any and all claims, damages and costs for injury to persons and property, including loss of use, and/or sickness, disease, or death of any person, for breach of any warranty, express or implied, for failure of the contractor or the subcontractor to comply with any applicable governmental law, rule, regulation or other requirement, and for products installed in or used in connection with the project.

TERMINATION PROVISIONS

Termination By Owner

Termination provisions are usually not found in the contract itself but rather in the general conditions. The contract itself generally states only that the owner may terminate the contract as provided in the general conditions.

- **For Cause**

a. General breaches

A termination for cause by owner provision can state specific grounds for termination but must also contain the general ground of termination for a substantial breach of a contract provision. Specific grounds for terminating the contractor may include failing to pay subcontractors for materials or labor, failing to supply sufficient skilled workers or proper materials or disregarding applicable laws, ordinances, rules, regulations or orders. Although such provisions often state that the failure to provide workers or to follow laws must be persistent or repeated, one incident of sufficient magnitude might be enough to support termination. The owner's rights can be increased by not including the words "persistent" or "repeated" with reference to such lapses.

> "THE TERMINATION PROVISION SHOULD ALSO SET FORTH THE PROCEDURE TO BE FOLLOWED IN TERMINATING THE CONTRACTOR. SETTING FORTH THE PROCEDURE SHOULD PREVENT ARGUMENTS FROM THE CONTRACTOR THAT IT HAS NOT BEEN PROPERLY TERMINATED UNDER THE CONTRACT, AND SHOULD ALSO PRESERVE THE OWNER'S RIGHTS TO CALL ON THE SURETY TO COMPLETE THE PROJECT."

b. Failure to provide schedules

Another specific ground that the owner might want to state concerns the technical specification provision requiring a contractor to provide certain schedules and scheduling information to the owner during the progress of the project. Updated schedules help ensure that the project is progressing satisfactorily and are also useful when reviewing contractor delay claims submitted before project completion. To help ensure that the owner receives the schedules, the owner should consider adding language to the general conditions stating that a failure to provide the required schedules may, at the sole discretion of the owner, constitute a breach of contract which will allow the owner to terminate the contract.

c. Notice and cure

The termination provision should also set forth the procedure to be followed in terminating the contractor. Setting forth the procedure should prevent arguments from the contractor that it has not been properly terminated under

the contract, and should also preserve the owner's rights to call on the surety to complete the project. The procedure should provide that the owner will give the contractor, and any surety, a certain number of days' written notice. The provision should then state that during this notice period, the contractor is to cure the default and that if the default is not cured, the contract will be terminated. In this way, the notice period is also a cure period.

Even if a cure period is not set forth in the contract, it is still possible, in some jurisdictions, that a surety could convince a court that the right to cure is implicit in the contract.[2] Providing a reasonable and specific cure period in the agreement removes this potential argument.

The contract or the performance bond should state that the surety has a certain number of days to proceed to complete the project after the owner's demand to the surety that it complete the project. The number of days allowed should be a reasonable number. Such provisions often state that the surety need only give notice within a certain period of time of its intent to complete the project. If this latter provision is used, it should be followed by a provision in which the surety is required to proceed to complete the project within so many days after giving notice of its intent to complete the project.

d. Without prejudice to other rights

In addition to providing notice and cure provisions, the termination provision should state that the contract can be terminated without prejudice to any other rights or remedies of the owner. Such other rights and remedies include an action for damages against the contractor.

e. Owner's rights of possession and completion

Subject to any prior rights of the surety to take over and complete the project, for example, the termination provision should also give the owner certain rights, including the right to take possession of the site to complete the project. The contract should also give the owner the right to complete the project by any reasonable method deemed expedient and to accept the assignment of whichever subcontracts the owner wishes to accept.

To ensure that the owner can accept subcontracts upon termination, the contract also must include a provision in which the contractor makes a contingent assignment of subcontracts to the owner, effective only after the owner terminates the contract for cause, and only for those subcontracts that the owner decides to accept through written notification to the selected subcontractors. The contingent assignment must, of course, be secondary to any pre-existing rights of the performance bond surety company to call upon those subcontractors to assist in the completion of the project.

f. Payment issues

Finally, the termination provision should state that the contractor has no right to any further payment until the work is completed, and that if the unpaid balance of the contract exceeds the cost to complete the project, including costs for professional services and expenses made necessary as a result of the termination, then the excess will be paid to the contractor. However, if the cost to complete exceeds the unpaid balance, then the contractor must pay the owner the difference.

• Due to Discovery of Unknown or Changed Conditions

The owner should also include a termination provision reserving its right

2. *See e.g.*, Carter v. Krueger, 916 S.W.2d 932 (Tenn. Ct. App. 1995).

to terminate the contract as a result of the discovery of unknown or changed conditions. The contractor would be paid for the work completed to the date of termination pursuant to the contract terms.

- **For Convenience**

The owner should consider including a provision allowing the owner to terminate for convenience, i.e., without cause. This provision would also state that either upon receiving notice or upon a particular date set forth in the notice of termination for convenience, the contractor must stop all work on the project. The contract should recognize an exception to the stop-work order for any actions required of the contractor to protect the work or for safety reasons. The provision should direct the contractor to immediately terminate all existing subcontracts and other contracts for work not ordered prior to the effective date of the termination, and not enter into any new contracts. The provision should then state that the contractor shall be paid for all work satisfactorily completed and costs properly incurred prior to the effective date of the termination.

There is some debate as to whether this provision should also provide that the contractor will receive overhead and profit on the work not executed. Whether to include such a provision is a business judgment for the owner. For example, not including such a provision might discourage potential bidders on a project from bidding. The decision whether to include the provision may also depend on applicable law in the owner's jurisdiction. If this provision is included, then the contract can further provide that if the owner terminates the contract based on the contractor's default, but it is later determined by a trier of fact that the contractor was not in default, then the termination instead would be deemed a termination for convenience.

- **For Mutual Convenience**

The owner can include a provision stating that the parties can agree in writing to terminate the agreement for their mutual convenience with the contractor to be paid as set forth in the contract for work completed to the date of termination.

Termination By Contractor

- **For Work Stoppage**

The contract could include only a general "termination for cause" provision in favor of the contractor. However, many contracts also specify that the contractor may terminate the contract if the work is stopped, without the fault of the contractor, the subcontractors etc., for a certain number of consecutive days. These provisions limit this right to terminate for a work stoppage to certain specified events: the work stops because a court or other public authority orders the work to be stopped, or the government declares a national emergency which makes material unavailable which stops the work. On the one hand, this provision is useful in that it ensures that the contractor cannot terminate the contract if the work stops for a period that is less than the specified number of days. On the other hand, this provision gives the contractor an absolute right to terminate the contract if the work is stopped, without the contractor's fault, for the number of days specified.

- **For Repeated Suspensions or Delays by Owner**

Contracts also sometimes include a provision stating that repeated suspensions, delays, or interruptions by the owner totaling more than

100 percent of the total number of days scheduled for completion or one hundred twenty days in any three hundred sixty-five day period, whichever is less, allow the contractor to terminate the agreement. This provision has the same infirmities as the "work-stoppage-for-a-certain-number-of-days" provision discussed above.

- **Notice**

In any case, the termination by contractor provisions should require that the contractor provide the owner with written notice of termination of the contract a certain number of days in advance of the effective date.

CONCLUSION

Well-written contract documents provide the foundation for a successful school construction project. By clearly defining the contractor's and the owner's respective responsibilities and rights, good documents can prevent problems from occurring and can lead to faster and less expensive resolution of disputes. Significant attention should be paid to the provisions that will govern six key elements of an effective school construction contract: change orders, hazardous materials, safety, performance and payment bonds, indemnification, and termination.

This up-front investment of time and money by the owner with its legal counsel and the other professionals on its project team is one of the more effective forms of "pre-marital counseling" available to a public agency. The creation of well-crafted contract documents will be rewarded many-fold as a school construction project proceeds from groundbreaking to dedication.

Appendix OTHER RESOURCES

PRIVATE ORGANIZATIONS

American Consulting Engineers Council
http://www.acec.org

American Institute of Architects
http://www.aia.org

American Society of Civil Engineers
http://www.asce.org

American Society of Landscape Architects
http://www.asla.org

Association of Facilities Engineers
http://www.afe.org/

Associated General Contractors of America
http://www.agc.org/Marketplace/contract_documents.asp

Construction Criteria Base
http://www.ccb.org/html

Construction Information Sources
http://ctca.unb.ca/ctca/sources/

Construction Management Association of America
http://www.cmaanet.org/default.htm

Construction Specifications Institute
http://www.csinet.org

Council of Educational Facility Planners, International
http://www/cefpi.org/

Design-Build Institute of America
http://www.dbia.org

Engineers Joint Contract Documents
http://www.pubs.asce.org/contract.html

National Clearinghouse for Educational Facilities
http://www.edfacilities.org

National Construction Law Center, Inc.
http://www.nclc.com/mod-aia.html
(sells owner friendly versions of selected AIA documents)

National Council of Structural Engineers Association
http://dwp.bigplanet.com/engineers/homepage/index.nhtml?profile=homepage

National Institute of Building Sciences
http://www.nibs.org

National School Plant Management Association
http://www.nspma.com

National Society of Professional Engineers
http://www.nspe.org

Programme on Educational Building
http://www.oecd.org/els/education/peb/

United States National CAD Standard
http://www.nationalcadstandard.org

GOVERNMENT AGENCIES

Energy $mart Schools
http://www.eren.doe.gov/energysmartschools/

Energy Star For Schools
http://yosemite1.epa.gov/estar/business.nsf/webmenus/Schools

Indoor Air Quality in Schools
http://www.epa.gov/iaq/schools/

School Construction and Design
http://www.ed.gov/inits/construction/index.html

South Carolina Office of State Engineer
http://www.state.sc.us/mmo/ose/osemenu.htm
(owner friendly versions of selected AIA documents)

Superfund Sites
http://www.epa.gov/superfund/sites/locate/index.htm

U.S. Architectural and Transportation Barriers Compliance Board
http://www.access-board.gov/

PUBLICATIONS

EDGAR H. BITTLE, PLANNING AND FINANCING SCHOOL IMPROVEMENT AND CONSTRUCTION PROJECTS (Education Law Association, 1996).

GLOWER W. JONES, ALTERNATIVE CLAUSES TO STANDARD CONSTRUCTION CONTRACTS (2d ed. Aspen Law & Business 1998)

Learning by Design
http://www.asbj.com/lbd.index2.html
(NSBA annual magazine supplement)

Ronald L. Williams, *Legal Issues in Construction Management, in* A SCHOOL LAW RETREAT, § E (NSBA Council of School Attorneys Seminar, San Antonio, Texas, 1999) (includes sample RFP and agreement)

THE NATIONAL SCHOOL BOARDS ASSOCIATION
COUNCIL OF SCHOOL ATTORNEYS

Membership Information

The NSBA Council of School Attorneys is the only national network of school law practitioners which provides its members with information and practical assistance on the latest developments in school law. Nearly 3,000 attorneys, representing school districts of all sizes, benefit from Council activities and programs. The Council's unique program:

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- expands your knowledge base and research resources with comprehensive publications, seminars and networking opportunities
- provides you and your clients with representation before the nation's courts and legislative bodies.

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06-181-1	Religion & Public Schools: Striking A Constitutional Balance		$28.00	$35.00	
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06-177-1	Safe Schools, Safe Communities		$20.00	$25.00	
06-169-1	A School Law Primer: Part I Special Price for Purchasing Part I, Part II, and Part III		$320.00 $768.00	$400.00 $960.00	
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06-163-1	Termination of School Employees: Legal Issues and Techniques		$28.00	$35.00	
06-162-1	Selecting and Working with a School Attorney: A Guide for School Boards		$28.00	$35.00	
06-160-1	Legal Handbook on School Athletics		$28.00	$35.00	
06-158-1	School Reform: The Legal Challenges of Change		$25.00	$30.00	
06-156-1	Reasonable Accommodation of Disabled Employees: A Comprehensive Case Law Reference		$12.00	$15.00	
06-151-1	Environmental Law: Fundamentals for Schools		$12.00	$15.00	
06-148-1	Child Abuse: Legal Issues for Schools		$20.00	$25.00	
06-142-1	Americans with Disabilities Act: Its Impact on Public Schools		$20.00	$25.00	
06-136-1	School Board Member Liability Under Section 1983		$12.00	$15.00	
06-125-1	School Law Library Filing System		$12.00	$15.00	
03-150-10	Legal Issues & Education Technology: A School Leader's Guide (Second edition 2001)		$28.00	$35.00	
Advocacy Notebooks —					
New 06-183-1	**2001 Advocacy Seminar Course Notebook** (October 2001) Alexandria, Virginia		$160.00	$200.00	
06-180-1	2000 Advocacy Seminar Course Notebook (October 2000) Phoenix, Arizona		$160.00	$200.00	
06-172-1	A School Law Retreat Advocacy Notebook (October 1999) Charleston, South Carolina		$160.00	$200.00	

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NSBA Council of School Attorneys' Publication List

April 2002

Americans with Disabilities Act: Its Impact on Public Schools (March 1993) by Nancy Fredman Krent, Scott S. Cairns, and Jean Arnold Dodge. This publication analyzes the key titles of the ADA applicable to public schools. Included are discussions of the law's anti-discrimination requirements in the areas of employment and state and local government services. The appendices reproduce relevant portions of the statute, implementing regulations and agency interpretive guidance. 120 pages. ISBN 0-88364-146-1 (List $25, National Affiliates and Council members $20).

Child Abuse: Legal Issues for Schools (March 1994). This monograph addresses the legal issues schools face in responding to child abuse, including employee background checks, reporting requirements, appropriate training, interagency cooperation, investigation of school-based abuse, due process, insurance coverage, victim assistance and liability. The appendices contain applicable state and federal laws and numerous sample policies and forms. 198 pages. ISBN 0-88364-184-4 (List $25, National Affiliates and Council members $20).

Desk Reference on Significant U.S. Supreme Court Decisions Affecting Public Schools (Revised Edition 2000). This desk reference provides attorneys and laymen alike with quick access to the name, citation and/or rule of virtually every U.S. Supreme Court case in which a public school district was a party and a substantive decision was rendered (however, it does not analyze the decision). It includes an extensive word index, table of cases with full parallel citations and table of constitutional and statutory provisions. 118 pages. ISBN 0-88364-227-1 (List $25, National Affiliates and Council members $20).

Environmental Law: Fundamentals for Schools (March 1995) by David Day. This monograph provides school attorneys and administrators with information on the basic requirements and potential issues under some of the federal environmental laws that affect schools. Such topics as Superfund, RCRA, asbestos, radon, lead, USTs and toxic torts are discussed with practical pointers provided to prevent and respond to environmental crises in school. Intended as a primer, this publication serves as an overview of the key environmental issues of which schools must be aware. 36 pages. ISBN 0-88364-194-1 (List $15, National Affiliates and Council members $12).

From the Ground Up: Legal Issues in School Construction (April 2002). As your school district continues to build, renovate and modernize school facilities, make sure you're prepared for any legal issues coming your way. Architect contracts. . . .bidding issues. . . .environmental issues. . . just a few of the many important legal issues you need to be ready for. Don't let legal issues delay your planning and building progress. Order this valuable resource today! 196 pages. ISBN 0-88364-252-2 (List $40, National Affiliates and Council Members $32).

Legal Handbook on School Athletics (March 1997). This monograph provides school attorneys, board members, administrators and athletic directors with an understanding of the various legal issues that affect school athletic programs. Discussion of the law is supplemented with practical advice. Topics include: discipline of athletes: due process considerations, eligibility rules protecting high school athletes, participation of private school and disabled students, drug testing, Title IX, public school sports and religion, injuries during physical education classes and extracurricular activities, spectator issues, student athletics and insurance issues, athletic personnel and volunteer issues. 120 pages. ISBN 0-88364-206-9 (List $35, National Affiliates and Council members $28).

Legal Issues & Education Technology: A School Leader's Guide (September 2001). This publication focuses on preventive strategies school leaders need to avoid costly and disruptive litigation that may result from incautious implementation or administration of technology in schools. The contents reflect recent legislation and court decisions and are presented in an easy to read format. Topics include Internet filters, legal requirements for accessible Web design and ergonomically sound facilities, student and staff privacy rights,COPPA, CIPA, FERPA, and ADA compliance issues and updates, copyright, acceptable use policies, off-site data storage policies, commercial agreements with e-businesses, open-meeting "sunshine" laws, and more. 154 pages. ISBN 0-88364-247-6 (List $35, Council, Technology Leadership Network members and National Affiliate members $28).

Reasonable Accommodation of Disabled Employees: A Comprehensive Case Law Reference (February 1996) by Brian Shaw. This reference book provides brief summaries of over 200 cases deciding reasonable accommodation issues under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. The summaries are arranged topically addressing: 1) general issues such as standards, knowledge of disability, suggesting an accommodation, burden of proof, and good faith defense; 2) over 20 different types of accommodations; and 3) undue hardship issues. A detailed table of contents and table of cases provide easy access to school attorneys looking for case law to help answer their clients' accommodation questions. 95 pages. ISBN 0-88364-200-X (List $15, National Affiliates/ Council of School Attorneys price $12).

Religion & Public Schools: Striking A Constitutional Balance (Revised edition, August 2001). This edition discusses the latest developments in the law, including the Supreme Court's decisions in *Milford, Mitchell, Santa Fe* and *Agostini*. This monograph is a compilation of articles written by Council members and focuses on the effect of the establishment and free exercise clauses of the first amendment and the constitutional issues surrounding accommodating employee religious beliefs, wearing of religious garb, curriculum content, school prayer/moment of silence, holiday observances, equal access, home schools and much more. 246 pages. ISBN 0-88364-244-1 (List $35, National Affiliates and Council members $28).

Safe Schools, Safe Communities (September 2000). Emphasizing the need for cooperation to prevent and respond to violence at school, this book examines how schools and communities can work together to make our schools safe. Among the topics discussed are the need to balance school safety needs and the rights of individual students, how to deal with threats of violence, the role of the school attorney in response to violence, and how to work with the media in times of crisis. Also included are other helpful materials such as sample interagency agreements, a list of other resources on school safety, warning signs that should trigger school response and sample policies. 98 Pages. ISBN 0-88364-238-7 (List $25, National Affiliates and Council Members $20).

School Board Member Liability Under Section 1983 (April 1992) by David B. Rubin. Like earlier editions published in 1981 and 1985, this monograph serves as a primer for both school board members and school attorneys on board member liability issues. The current version seeks to explain clearly and accurately in layman's terms the basics of civil rights law under Section 1983. It focuses on the types of claims most commonly brought under Section 1983 against school boards and presents factual circumstances and how the courts have applied the law in immunity defenses. 44 pages. ISBN 0-88364-134-8 (List $15, National Affiliates and Council members $12).

A School Law Primer: Part I (Revised edition, January 2001). Created to meet the needs of the attorneys who serve public school districts and those of the school community at large, *A School Law Primer: Part I* is intended as a training manual to help you keep your clients out of court. Specifically, the *Primer* was designed to save hundreds of hours in research time, help when you have been called upon to do a presentation, and be a valuable resource for training new associates and clients. Each chapter consists of three main components - a presentation outline and case summaries, participant "notes pages," and a diskette containing Microsoft PowerPoint® slides that correspond to the outline. This revised edition features these subjects: Student Discipline, Students' Rights, Special Education, and Teacher Discipline. ISBN 0-88364-224-7 (List $400.00, National Affiliates and Council Members $320.00. Purchase two editions of the Primer for $512, non member price $640, or all three editions for $768. Non member price $960).

A School Law Primer: Part II (March 2000). Update your law library with the second part of this training tool. This school law training manual covers Employee Rights, Negligence, School Safety and Sexual Harassment. Each chapter consists of three main components — a presentation outline and case summaries; participant "notes pages;" and a diskette containing Microsoft Powerpoint® slides that correspond to the outline. ISBN 0-88364-234-4 (List $400, NSBA Council of School Attorneys' members and NSBA National Affiliate School Districts $320. Purchase two editions of the Primer for $512, non member price $640, or all three editions for $768. Non member price $960).

A School Law Primer: Part III (April 2002). This edition of the School Law Primer series features the following subjects: Religion, Discrimination, Board Authority and Curriculum Issues. Each chapter contains presentation outlines and case summaries, participant "notes pages" and ready made Power Point® slides available on a diskette or via the Internet. This approach was selected to help new school attorneys learn quickly the fundamental principles that will form their stock in trade as well as to save time for attorneys called upon to prepare and present school law training for school board members, administrators, staff or other school attorneys. ISBN 0-88364-255-7 (List $400, NSBA Council of School Attorneys' members and NSBA National Affiliate School Districts $320. Purchase two editions of the Primer for $512, non member price $640, or all three editions for $768. Non member price $960).

School Law in Review 2002 (April 2002). This digest of papers presented at the 2002 Annual School Law Seminar includes the following topics: students' rights, religion, environmental hazards for urban schools, high stakes testing, free speech, school employee misconduct and misuse of technology, diversity in higher education, student drug testing, FERPA and student record keeping, investment contracts, FLSA record keeping practice tips, ethics, Supreme Court and legislative updates, IEP development process, and school construction issues. ISBN 0-88364-254-9 (List $40, Council members - first copy free. National Affiliates and additional Council copies $32).

School Reform: The Legal Challenges of Change (April 1996). This monograph is intended to assist school attorneys in their efforts to advise school boards on the legal issues that accompany various reform measures. Covering such topics as school finance, choice, site-based management, privatization, alternative schools, charter schools and tenure reform, the discussion ranges from constitutional dilemmas to statutory issues to labor relations implications. Review of the law is supplemented with practical advice. 150 pages. ISBN 0-88364-202-6 (List $30, National Affiliates and Council members $25).

Selecting and Working with a School Attorney: A Guide for School Boards (April 1997). In today's world, getting good legal advice when problems arise and how to avoid problems in the first place is a must for school boards. This book shows school board members how to select and to work effectively with a school attorney. Topics include: historical development of the role of the school attorney, hiring in-house counsel v. an outside attorney, selection, recruitment and retention of legal counsel, ethical issues in school board representation, evaluation and termination of school district counsel, the school attorney as a preventive law practitioner, and how to work effectively with the school attorney. Also included in the appendices are sample policies, forms, agreements and checklists. 142 pages. ISBN 0-88364-209-3 (List $35, National Affiliates and Council members $28).

Sexual Harassment by School Employees (March 2001). School leaders and school lawyers faced with the task of preventing and responding to allegations of sexual harassment by employees will find the information they need in this monograph. Covering harassment that occurs between employees and employee harassment of students, it discusses current federal case law, effective policy development, how to conduct internal investigations, training advice and resources and agency (OCR and EEOC) investigations. The appendices contain many useful documents including regulations, agency guidance, sample policies and checklists. 228 pages. ISBN 0-88364-237-9 (List $35, National Affiliates and Council members $28).

Student-to-Student Sexual Harassment: A Legal Guide for Schools (Revised edition, March 2000). Addressing a complex legal and social issue, this monograph provides the school law practitioner and school leader with information on how to prevent, respond to, analyze and defend student to student harassment claims. In addition to discussing federal case law, it includes a section on policy development, advice on conducting investigation, tips for training, and analysis of the Office for Civil Rights guidelines and appendices containing OCR documents, sample policies and forms and helpful check lists. 192 pages. ISBN 0-88364-235-2 (List $35, National Affiliates and Council members $28).

Student Testing and Assessment: Answering the Legal Questions (September 2000). Addressing one of the most controversial developments in education reform today, this publication takes a look at the legal issues with which education leaders and decision makers are faced in setting policy on and implementing high-stakes testing programs. Among the materials included are an overview of state testing laws and federal activity, a framework for making policy decisions about test use, discrimination and due process issues that may arise, considerations for testing special student groups, such as children with disabilities and limited English proficiency, and accountability of educators, schools and districts based on student test scores. 86 Pages. ISBN 0-88364-239-5 (List $25, National Affiliates and Council members $20).

Termination of School Employees: Legal Issues and Techniques (April 1997). Disputes over employee termination are the most common legal problem faced by schools. In order to assist school attorneys and officials in handling these disputes, this monograph addresses the legal issues and suggests effective techniques associated with proper termination of school employees. Topics include: employee performance documentation, evaluation, remediation, settlement agreements, public employee speech and off duty conduct, termination of drug/alcohol abusers, legal issues in trying a misconduct case, due process, and employment at will. 316 pages. ISBN 0-88364-210-7 (List $35, National Affiliates and Council members $28).

The 1999 IDEA Regulations: A Practical Analysis (July 1999). It is imperative that schools understand the special rules and requirements that they must follow in addressing the needs of students served under the Individuals with Disabilities Education Act (IDEA). This publication is a guide for all school professionals involved in special education to grasp the basic requirements and implications of the regulations issued by the U.S. Department of Education. Using an easy to follow format that tracks the regulations rule-by-rule, special education experts explain what you need to know and what you must do to comply with the provisions on a broad range of issues including public charter schools, graduation of special needs students, assessments, use of Medicaid and insurance, IEP requirements, services to children in private schools, procedural safeguards, and discipline of children with disabilities. 96 pages. ISBN 0-88364-225-5 (List $25, National Affiliates and Council members $20).

2001 Advocacy Seminar Notebook (October 2001, Alexandria, Virginia). This loose-leaf notebook is a compilation of the presentations given at the Council's October 2001 advocacy seminar. Topics include drawing the line separating church and state, constitutional rights of secondary school students, current issues in special education, current issues in employment discrimination, vouchers and school choice, Title I of the Elementary and Secondary Education Act of 1965, high-stakes testing; Americans with Disabilities Act, ethics and the school attorney, Children's Internet Protection Act, student discipline, federal issues and national trends, and inside the Supreme Court. 606 pages. ISBN 0-88364-250-6 (List $200, National Affiliates and Council members $160).

2000 Advocacy Seminar Notebook (October 2000, Phoenix, Arizona). This loose-leaf trial notebook is a compilation of the presentations given at the Council's October 2000 advocacy seminar. Topics include responding to student threats, current issues of students with disabilities, FERPA, E-mail and access to public meetings and records, the latest on prayer in schools, Equal Access Act, legal considerations in measures to promote school safety, recent developments in hiring and retaining superintendents, responding to temporary restraining orders, high stakes testing, disciplining employees for off-campus conduct, private businesses and schools, race as a factor in student assignment, Cincinnati's alternative dispute resolution process, do not resuscitate orders and other issues related to medically fragile students, and the attorney-client privilege. 628 pages. ISBN 0-88364-241-7 (List $200, National Affiliates and Council members $160).

A School Law Retreat 1999 (October 1999, Charleston, South Carolina). This loose-leaf trial notebook is a compilation of the presentations given at the Council's October 1999 advocacy seminar. Topics include tuition vouchers, student drug testing, employee benefits, superintendent contracts and settlement agreements, peer sexual harassment, the Internet and use of e-mail, board member issues, linking teacher evaluation to student achievement, sexual orientation, student and employee issues, religion and the schools, voluntary desegregation, student-to-student sexual harassment claims under Title IX, student control and discipline, responding to threats of violence, the ethical use of technology in the practice of school law, and the Individuals with Disabilities Education Act (IDEA). 440 pages. ISBN 0-88364-288-X (List $200, National Affiliates and Council members $160).

about NSBA...

The National School Boards Association is the nationwide organization representing public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education through school board leadership. NSBA achieves its mission by representing the school board perspective before federal government agencies and with national organizations that affect education, and by providing vital information and services to state associations of school boards and local school boards throughout the nation.

NSBA advocates local school boards as the ultimate expression of grassroots democracy. NSBA supports the capacity of each school board—acting on behalf of and in close concert with the people of its community—to envision the future of education in its community, to establish a structure and environment that allow all students to reach their maximum potential, to provide accountability for the people of its community on performance in the schools, and to serve as the key community advocate for children and youth and their public schools.

Founded in 1940, NSBA is a not-for-profit federation of associations of school boards across the United States and its territories. NSBA represents the nation's 95,000 school board members that govern 14,890 local school districts serving the nation's more than 47 million public school students. Virtually all school board members are elected; the rest are appointed by elected officials.

NSBA policy is determined by a 150-member Delegate Assembly of local school board members. The 25-member Board of Directors translates this policy into action. Programs and services are administered by the NSBA executive director and a 150-person staff. NSBA is located in metropolitan Washington, D.C.

NSBA's Programs and Services

- **National Affiliate Program** — enables school boards to work with their state association and NSBA to identify and influence federal and national trends and issues affecting public school governance.
- **Council of Urban Boards of Education** — serves the governance needs of urban school boards.
- **Large District Forum** — serves the governance needs of large but non-urban boards.
- **Rural and Small District Forum** — serves the governance needs of rural and small enrollment districts.
- **Federal Relations Network** — school board members from each congressional district actively participate in NSBA's federal and national advocacy efforts.
- **Federal Policy Coordinators Network** — focuses on the administration of federally funded programs.
- **Award Winning Publications** — **American School Board Journal, School Board News,** and special substantive reports on public school governance throughout the year.
- **ITTE: Education Technology Programs and Technology Leadership Network** — advance public education through best uses of technology in the classroom and school district operations.
- **Council of School Attorneys** — focuses on school law issues and services to school board attorneys.
- **Annual Conference and Exposition** — the nation's largest policy and training conference for local education officials on national and federal issues affecting the public schools in the United States.
- **National Education Policy Network** — provides the latest policy information nationwide and a framework for public governance through written policies.
- **Training/Development and Resource Exchange** — meetings, online clearinghouse and consulting services to develop leadership of state school boards associations and local school boards.

National School Boards Association
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Excellence and Equity in Public Education through School Board Leadership

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